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Supreme Court, U.S.
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No. 87-

In The

Supreme Court of the United States

October Term, 1987

The Coastal Corporation,
Coastal States Marketing, Inc.,
Belcher Oil Company,
The Belcher Company of New York, Inc.,
Belcher New England, Inc. and
Belcher New Jersey, Inc.,

Petitioners,

v.

Apex Oil Company,

Respondent.

Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Second Circuit

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October 19, 1987

QUESTIONS PRESENTED

1. Whether, in an antitrust conspiracy case based upon circumstantial evidence, summary judgment for the defendants may be reversed, when the District Court has found that the evidence was entirely consistent with the independent economic self-interest of each defendant, and the Court of Appeals rejected that finding based solely upon circumstantial evidence of parallel conduct which was incapable of a dominant inference of conspiracy?

2. Whether, in an antitrust conspiracy case, summary judgment for the defendants may be reversed where the evidentiary basis for the claim of concerted action is an uncorroborated double hearsay statement?

PARTIES TO THE PROCEEDING

Petitioners are The Coastal Corporation, Coastal States Marketing, Inc., Belcher Oil Company, The Belcher Company of New York, Inc., Belcher New England, Inc. and Belcher New Jersey, Inc.[1]

Respondent is Apex Oil Company.[2]

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[1] Petitioner The Coastal Corporation, a publicly held corporation, has a number of wholly owned subsidiaries, including Cosbel Petroleum Corporation and Coastal Holding Corporation.

Petitioners Belcher Oil Company, Belcher New England, Inc., and The Belcher Company of New York, Inc. are each wholly owned by Cosbel Petroleum Corporation, a direct subsidiary of The Coastal Corporation. At the time this action was commenced, petitioner Belcher New Jersey, Inc. was a wholly owned subsidiary of Cosbel Petroleum Corporation; it has subsequently been merged into The Belcher Company of New York, Inc.

Petitioner Coastal States Marketing, Inc. (now Coastal Refining and Marketing, Inc.) is wholly owned by Coastal Holding Corporation, a direct subsidiary of The Coastal Corporation.

[2] The Court of Appeals affirmed the District Court's grant of summary judgment in favor of defendants Joseph DiMauro, Triad Petroleum, Inc., TIC Commodities, Inc., Stinnes Corporation, Stinnes Interoil, Inc., Eastern of New Jersey, Inc., George E. Warren Corporation, New York Mercantile Exchange and Julian Raber. These companies are designated as respondents pursuant to Rule 19.6 of this Court.

Defendant Global Petroleum Corporation was voluntarily dismissed on November 22, 1983. Defendants Northeast Petroleum Industries, Inc. and Northeast Petroleum Corporation were voluntarily dismissed on May 7, 1987.

TABLE OF CONTENTS

	PAGE
QUESTIONS PRESENTED	i
PARTIES TO THE PROCEEDING	ii
TABLE OF AUTHORITIES	v
OPINIONS BELOW	2
JURISDICTION	2
STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	3
REASONS FOR GRANTING THE WRIT	7
I. Certiorari Should Be Granted To Review The Unwarranted Exception That The Court Of Appeals Has Created To This Court's Controlling Standard For Inferring An Antitrust Conspiracy From Circumstantial Evidence	8
II. Certiorari Should Be Granted To Review The Propriety Of The Court Of Appeals' Reliance On Hearsay In Permitting An Inference Of Membership In An Antitrust Conspiracy	20
CONCLUSION	24
APPENDIX	
STATUTORY PROVISIONS INVOLVED	
Sherman Act § 1, 15 U.S.C. § 1	1a
Sherman Act § 2. 15 U.S.C. § 2	2a
Commodity Exchange Act § 4(b), 7 U.S.C. § 6(b)	2a

PAGE

Commodity Exchange Act § 9(b), § 7 U.S.C. § 13(b) 3a
Commodity Exchange Act § 13(a), § 7 U.S.C. § 13c(a) 4a
Rule 801(d)(2)(E) Of The Federal Rules of Evidence 5a
OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DATED JUNE 17, 1987 (822 F.2d 246) 6a
JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DATED JUNE 17, 1987 ..... 35a
ORDERS OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT
Order Denying Rehearing In Banc, August 11, 1987 ..... 37a
Order Denying Rehearing, July 21, 1987 ..... 39a
OPINION OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK DATED AUGUST 8, 1986 (641 F. Supp. 1246) 41a

TABLE OF AUTHORITIES

Cases

PAGE

Blue Chip Stamps v. *Manor Drug Stores*, 421 U.S. 723 (1975) 7

Bourjaily v. *United States*, — U.S.—, 107 S. Ct. 2775 (1987) 8, 20, 21, 22, 23

Catalano, Inc. v. *Target Sales, Inc.*, 446 U.S. 643 (1980) 7

Celotex Corp. v. *Catrett*, 477 U.S. 317, 106 S. Ct. 2548 (1986) 15

First Nat'l Bank v. *Cities Service Co.*, 391 U.S. 253 (1968) 12, 13, 15

Gillespie v. *United States Steel Corp.*, 379 U.S. 148 (1964) 7

Glasser v. *United States*, 315 U.S. 60 (1942) 21

Illinois Corporate Travel, Inc. v. *American Airlines, Inc.*, 806 F.2d 722 (7th Cir. 1986) 12

Impro Products, Inc. v. *Herrick*, 1982-2 Trade Cas. (CCH) ¶ 64.906 (S.D. Iowa 1982), *aff'd*, 715 F.2d 1267 (8th Cir. 1983), *cert. denied*, 465 U.S. 1026 (1984) 17

Key Financial Planning Corp. v. *ITT Life Insurance Corp.*, No. 84-2800 (10th Cir. Aug. 28, 1987) (LEXIS, Genfed library, USApp file) 18

Kreuzer v. *American Academy of Periodontology*, 735 F.2d 1479 (D.C. Cir. 1984) 17

Matsushita Electrical Industrial Co. v. *Zenith Radio Corp.*, 475 U.S. 574, 106 S. Ct. 1348 (1986) .... passim

Modern Home Institute, Inc. v. *Hartford Accident & Indemnity Co.*, 513 F.2d 102 (2d Cir. 1975) 15, 17

Norfolk Monument Co. v. *Woodlawn Memorial Gardens, Inc.* 394 U.S. 700 (1969) 8, 9

O.S.C. Corp. v. *Apple Computer, Inc.*, 792 F.2d 1464 (9th Cir. 1986) 18

Poller v. *Columbia Broadcasting System, Inc.*, 368 U.S. 464 (1962) 9

PAGE

Reborn Enterprises, Inc. v. *Fine Child, Inc.*, 590 F. Supp. 1423 (S.D.N.Y. 1984), *aff'd*, 754 F.2d 1072 (2d Cir. 1985) 15

Richards v. *Neilsen Freight Lines*, 810 F.2d 898 (9th Cir. 1987) 19, 20

United States v. *Geaney*, 417 F.2d 1116 (2d Cir. 1969), *cert. denied sub nom. Lynch* v. *United States*, 397 U.S. 1028 (1970) 21

United States v. *Hernandez*, No. 86-1339 (10th Cir. Sept. 22, 1987) (LEXIS, Genfed library, USApp file) 23

United States v. *Martinez*, 825 F.2d 1451 (10th Cir. 1987) 23

United States v. *Nersesian*, 824 F.2d 1294 (2d Cir. 1987) 23

United States v. *Shoffner*, 826 F.2d 619 (7th Cir. 1987) 23

United States v. *Terry*, 702 F.2d 299 (2d Cir.), *cert. denied sub nom. Williams* v. *United States*, 461 U.S. 931 (1983) 21

Valley Liquors, Inc. v. *Renfield Importers, Ltd.*, 822 F.2d 656 (7th Cir. 1987) 18

White v. *Rockingham Radiologists, Ltd.*, 820 F.2d 98 (4th Cir. 1987) 18

Statutes and Rules

7 U.S.C.,

§ 6(b), Section 4(b), Commodity Exchange Act 2

§ 7a(8), Section 5a(8), Commodity Exchange Act 2

§ 7(d), Section 5(d), Commodity Exchange Act 2

§ 13(b), Section 9(b), Commodity Exchange Act 2

§ 13c(a), Section 13(a), Commodity Exchange Act 2

15 U.S.C.,

§ 1, Section 1, Sherman Act 2

PAGE

§ 2, Section 2, Sherman Act 2

Federal Rules of Evidence,

Rule 104 . . . . . 21, 22

Rule 801(d)(2)(E) 2, 21, 22

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

THE COASTAL CORPORATION,
COASTAL STATES MARKETING, INC.,
BELCHER OIL COMPANY,
THE BELCHER COMPANY OF NEW YORK, INC.,
BELCHER NEW ENGLAND, INC. and
BELCHER NEW JERSEY, INC.,

Petitioners,

v.

APEX OIL COMPANY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners respectfully request that a writ of certiorari be issued to review the decision and judgment of the United States Court of Appeals for the Second Circuit, entered on June 17, 1987, which reversed, as to petitioners, the decision and judgment of the United States District Court for the Southern District of New York dismissing all antitrust, commodity manipulation and common law claims in respondent's amended complaint.

Opinions Below

The opinion of the Court of Appeals is reported at 822 F.2d 246 (6a-34a).[3] Upon petition for rehearing with suggestion for rehearing in banc, the Court of Appeals issued separate unreported orders (37a and 39a). The opinion of the District Court granting summary judgment is reported at 641 F. Supp. 1246 (41a-117a).

Jurisdiction

The judgment of the Court of Appeals was entered on June 17, 1987 (35a). A timely petition for rehearing was denied on July 21, 1987 (39a); rehearing in banc was denied on August 11, 1987 (37a). This Court has jurisdiction to review the judgment of the Court of Appeals by writ of certiorari pursuant to 28 U.S.C. § 1254(1).

Statutory Provisions Involved

The amended complaint of plaintiff-respondent Apex Oil Company ("Apex") alleged violations as to petitioners of sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1 and 2 (1a-2a); sections 4(b), 9(b) and 13(a) of the Commodity Exchange Act (the "CEA"), 7 U.S.C. §§ 6(b), 13(b) and 13c(a) (2a-4a); and common law fraud.[4] In addition, the issues here involve interpretation of Rule 801(d)(2)(E) of the Federal Rules of Evidence (5a).

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[3] References to the Appendix to the Petition are cited herein as "...a".

[4] The complaint also alleged, as against certain defendants other than petitioners, failure to regulate a commodities market in violation of the CEA, 7 U.S.C. §§ 7a(8) and 7(d).

Following the District Court's decision, Apex abandoned so much of its claims as alleged violations of § 9(b) of the CEA, 7 U.S.C. §§ 13(b) by spreading of false reports; its claims under § 4(b) of the CEA, 7 U.S.C. § 6(b); and its claim of common law fraud.

Statement Of The Case

At the core of this massive case is Apex' allegation that petitioners (hereinafter, collectively, "Belcher") unlawfully conspired with others to exercise identical contractual rights in connection with the delivery of No. 2 heating oil pursuant to futures contracts traded on the New York Mercantile Exchange requiring delivery of No. 2 heating oil in New York Harbor in February 1982 ("February Contracts").[5] Belcher and defendants Stinnes, Eastern, Northeast, Global and GEW,[6] as "longs" (or buyers) of February Contracts, each had the right to choose the date on which to accept delivery of oil under those contracts. Apex, as the "short" (or seller) matched with the above "longs", theorized that the longs, aided by DiMauro and his companies, Triad and TIC[7] and the Exchange and Raber,[8] unlawfully conspired to exercise those contractual rights, forcing Apex to deliver, in the first three days of February 1982, much of the No. 2 heating oil which Apex, as a substantial short in February Contracts, had obligated itself to deliver. Such concerted

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[5] Each contract provides for delivery of 1000 barrels. Each barrel contains 42 gallons.

[6] "Stinnes" means Stinnes Corporation and Stinnes Interoil, Inc. "Eastern" means Eastern of New Jersey, Inc. "Northeast" means Northeast Petroleum Industries, Inc. and Northeast Petroleum Corporation. "Global" means Global Petroleum Corporation. "GEW" means George E. Warren Corporation. The District Court held that Apex had failed to proffer evidence demonstrating that the actions of Belcher and the other long defendants were the product of concerted, rather than independent, action. Subsequent thereto, but prior to the decision of the Court of Appeals, Apex dropped its claims against Northeast. The Court of Appeals affirmed the dismissal of the complaint as to all long defendants except Belcher.

[7] "DiMauro" means Joseph DiMauro. "Triad" means Triad Petroleum, Inc. "TIC" means TIC Commodities, Inc. These broker defendants were dismissed by the District Court, a dismissal sustained by the Court of Appeals.

[8] "Exchange" means New York Mercantile Exchange. "Raber" means Julian Raber, its Vice Chairman. These Exchange defendants were dismissed by the District Court, a dismissal sustained by the Court of Appeals.

action, Apex further alleged, forced it to purchase the oil it needed to meet its contractual obligations at artificially high prices.

The Exchange Rules unambiguously provided that the seller nominated the site of delivery, and that the buyer determined both the time of delivery and mode of delivery, *i.e.*, when to take delivery of the oil and the method (*e.g.*, tanker, barge, truck, etc.) by which the oil would be lifted. Although the parties were permitted to agree to changes in nominated dates and sites, the Rules did not require such agreements, and unilateral changes in dates and sites were not permitted.

On January 29, 1982, at the close of trading in February Contracts (Exchange contracts calling for delivery in February), Apex held an open short position of 4,378 contracts, comprising nearly 90% of the total open position. Thus, Apex had obligated itself to deliver 183,876,000 gallons of heating oil between February 6 and February 28, 1982, on dates to be selected by the longs.

On February 1, Apex designated the GATX terminal in Carteret, New Jersey as the facility from which it would deliver 4,281 contracts (179,802,000 gallons) of heating oil. Apex designated the GATX terminal at a time when it had a negative inventory of No. 2 oil there.

In early February 1982, the market anticipated that the price of heating oil would be declining over the coming month. The anticipated price decline was shown by the fact that as of February 1, the closing price for February Contracts was 89.7¢, nearly 6¢ higher than the contemporaneous price for March Contracts (Exchange contracts calling for delivery in the month of March), which was 83.9¢.

During the first few days of February, Belcher, Stinnes, Eastern, Northeast, GEW and Global[9], in accordance with

[9] As noted, Apex dropped its claims against Global on November 22, 1983, prior to the making of any summary judgment motions.

Exchange Rules, submitted nominations for early February delivery. In particular:

On February 2, Belcher nominated to lift all of the oil represented by its 315 contracts, by barge, on February 6.

On February 2, Global nominated 51 of its 362 contracts to be lifted by barge for February 6, and 23 contracts by barge for February 7. On February 3, Global nominated 25 contracts by barge for February 6.

On February 2, Northeast nominated to lift 200 contracts by tanker at 8:00 a.m. on February 8. The following day, Northeast nominated 548 February Contracts for delivery during the first half of February, designating barge liftings from February 6 through February 12.

Unable to meet its delivery obligations in accordance with the nominations of the longs, Apex, on February 5, 1982, resolved its delivery difficulties — caused by its lack of oil in New York Harbor — with most of the defendants. Each resolution was separately negotiated and each was on substantially different terms. In particular:

With respect to Belcher's 315 contracts, Apex and Belcher agreed that 190 contracts would be delivered to Boston early in the second week of February; that 110 contracts would be delivered on February 6 to facilities in New York Harbor, but not exclusively the GATX terminal; and that the remaining 15 contracts need not be delivered. Belcher paid Apex the January 29 market settlement price of 89.7¢ per gallon.

With respect to Northeast's 748 contracts, Apex purchased from Northeast 500 contracts at 96.25¢ per gallon which Apex "book transferred" (i.e., sold back, without physical delivery) to Northeast, resulting in a profit to Northeast of $1,375,000. Apex delivered the remaining 248 contracts, by barges, on several dates during the second week of February, from various terminals in New York Harbor.

With respect to Global's 362 contracts, it sold its contracts to Apex at 95¢ per gallon, which Apex delivered back in

satisfaction of its Exchange obligation, resulting in a profit to Global of $805,812.

Thus, Northeast and Global made profits of $1,375,000 and $805,812 respectively, while Belcher made no profit at all.[10]

1. *The District Court Proceedings* — After four years of discovery, during which hundreds of thousands of pages of documents were exchanged and 120 depositions taken, all defendants, including Belcher, made motions for summary judgment addressing all of Apex' claims. On August 8, 1986, the District Court granted summary judgment dismissing each of Apex' claims. As to the Sherman Act claims and commodity manipulation claims, the District Court held that the evidence adduced by Apex did not tend to prove the existence of concerted action by any of the defendants.[11]

Defendants' summary judgment motions with respect to the antitrust and commodity manipulation claims focused narrowly on the existence of a conspiracy, namely, whether there was sufficient evidence to permit a jury to infer that the timing or maintenance of defendants' nominations for delivery of oil was the product of concerted, rather than individual, action. After excluding inadmissible material presented by Apex and noting that its remaining "evidence" — considered in a light most favorable to it — was as consistent with independent action as with concerted action, the District Court concluded that the evidence, "viewed as a whole",

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[10] Belcher's insistence upon delivery of product was consistent with its perceived marketing demands for No. 2 oil by its customers.

[11] The Court also dismissed the claims against the Exchange and Raber for failure to regulate properly a commodities market (97a-107a).

As to the claim of spreading false or misleading reports, the District Court held that Apex failed to adduce evidence demonstrating that any statements were more than unactionable rumor (96a-97a). As noted, Apex has abandoned this claim.

"fails to supply an inference [of conspiracy] which is reasonable in light of the powerful inference of independent response to existing economic conditions" (93a).

2. *The Court of Appeals Proceedings* — On appeal, a panel consisting of two judges of the Second Circuit and one judge of the District Court for the Southern District of New York sitting by designation, faced solely with the issue of the existence of concerted action, affirmed the District Court's judgment as to all remaining defendants except Belcher (6a-34a). As we show below, in doing so, the Court misapplied the standard set down by this Court in *Matsushita Electrical Industries Corp.* v. *Zenith Radio Corp.*, 475 U.S. 574, 106 S. Ct. 1348 (1986) by allowing an inference of conspiracy to be drawn from hearsay which, in all events, was incapable of a dominant inference of conspiracy.

Reasons for Granting the Writ

In view of the enormous expenditure of judicial effort which must be devoted to antitrust conspiracy trials, the importance of pretrial elimination of spurious antitrust claims (reaffirmed in *Matsushita*), the costs to the parties and the *in terrorem* effect of potential treble damage awards, we respectfully submit that the question of the propriety of reversing summary judgment in marginal antitrust cases such as this is of such exceptional importance as to warrant review by this Court. The controlling issues presented by this litigation are both "fundamental to the further conduct of the case" and of paramount public policy concern. *See, e.g., Catalano, Inc.* v. *Target Sales, Inc.*, 446 U.S. 643, 643-44 (1980); *Blue Chip Stamps* v. *Manor Drug Stores*, 421 U.S. 723, 725-27 (1975); *Gillespie* v. *United States Steel Corp.*, 379 U.S. 148, 152-53 (1964).

In particular, the decision below warrants immediate review because: (i) it signals a significant retreat from the increasingly effective use of summary judgment in unmeritorious antitrust conspiracy cases as encouraged by *Matsushita*; and (ii) it is in conflict with the standard established

by this Court in *Matsushita*, and by other Circuit Courts applying *Matsushita*, for inferring conspiratorial conduct from circumstantial evidence (Point I).

Further, the Court of Appeal's reliance upon uncorroborated hearsay to permit an inference of concerted action constitutes a questionable, and we believe incorrect, interpretation of this Court's recent decision in *Bourjaily* v. *United States*, —U.S.—, 107 S. Ct. 2775 (1987) (Point II).

ARGUMENT

I.

CERTIORARI SHOULD BE GRANTED TO REVIEW THE UNWARRANTED EXCEPTION THAT THE COURT OF APPEALS HAS CREATED TO THIS COURT'S CONTROLLING STANDARD FOR INFERRING AN ANTITRUST CONSPIRACY FROM CIRCUMSTANTIAL EVIDENCE.

The Second Circuit has created an exception to this Court's standard for inferring an antitrust conspiracy in cases resting upon circumstantial evidence. This exception would empower the lower courts to dispense with this Court's clear rule in *Matsushita* for inferring an antitrust conspiracy from such evidence and would thus make it considerably more difficult to dispose of unfounded antitrust conspiracy claims prior to trial. Reflecting a throwback to the analysis of *Norfolk Monument Co.* v. *Woodlawn Memorial Gardens, Inc.*, 394 U.S. 700 (1969), the Court of Appeals' ruling cannot be reconciled with *Matsushita*, or the decisions of other circuits applying its teaching, making review by this Court necessary to provide uniformity in this area of antitrust policy.

In *Matsushita*, this Court made clear that to survive a motion for summary judgment, a plaintiff must present evidence " 'that tends to exclude the possibility' that the alleged conspirators acted independently." 106 S. Ct. at 1357. It

reaffirmed that "*conduct as consistent* with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy." 106 S. Ct. at 1357 (emphasis supplied.) A reading of the Court of Appeals' opinion demonstrates that it did not apply those standards but, rather, inferred conspiracy from fatally ambiguous evidence, i.e., hearsay evidence incapable of a *dominant* inference of conspiracy. Contrary to *Matsushita* and the Circuit Courts which have correctly applied its teaching, the Second Circuit has improperly shifted the burden, so that if an inference of independent action is equal in strength to the inference of concerted action, summary judgment should be denied. While this may have once been the law,[12] it cannot be said to be so today.

The Court of Appeals, like the District Court before it, examined and dismissed nearly all of Apex's "evidence" on the grounds that it did not "give[ ] rise to a permissible inference of a conspiracy among the defendants." (32a). The Court of Appeals differed from the District Court, however, in that it found two bits of evidence sufficient to give rise to inferences of (a) a conspiracy between Global and Northeast and (b) Belcher's membership in that conspiracy.

The first piece of "evidence" was a notebook entry of Dennis Denihan of Northeast allegedly memorializing a February 2, 1982 telephone conversation between Fred Slifka of Global and Don Oliver of Northeast in which Denihan did not participate.[13] That entry read:

DAO
Re Merc Nominations

---

[12] *E.g., Poller* v. *Columbia Broadcasting System Inc.*, 368 U.S. 464 (1962); *Norfolk Monument Co.* v. *Woodlawn Memorial Gardens, Inc., supra.*

[13] When Denihan was initially questioned about the notes, his recollection was that they followed a conversation with "Mr. Oliver or Mr. Slifka." After he had had the opportunity to reflect, Denihan recalled that the notes memorialized a conversation between Oliver and Kaneb, also of Northeast, and not between Oliver and Slifka.

(1) All nominations in writing
(2) If not accepted, NPC [Northeast] to demand $100/ contract/day penalty for 5 days At end of five days window NPC to demand 10 pct penalty + go to court
(3) NPC to go to newspaper and expose exchange
(4) All loadings must be GATX [Portion obliterated].

(22a)

In its decision, the District Court had rejected this evidence as not being probative of a conspiracy:

> Even assuming Oliver discussed each of these matters with Slifka, this evidence does not tend to exclude the possibility of independent action. If one first assumes a conspiracy, as Apex's presentation does, discussion of these matters seems consistent with a conversation between two conspirators. This evidence, however, does not help to *prove* conspiracy because it does not tend to exclude the inference that the items discussed were a predictable response to existing conditions. While it could be imagined that the longs had conspired to pressure Apex, and Slifka and Oliver were merely discussing the final details of the effort, it is more likely that their conversation was a natural one between traders faced with a common concern: the possibility of an Apex default on deliveries.
>
> Thus, in the face of an Apex shortage, it was not unreasonable for these competitors to discuss matters of common interest. Absent some showing that the content of the communications supports a reasonable inference of conspiracy, a discussion of shared concerns does not a conspiracy make. *Hunt*, 465 F. Supp. at 230-31. Mentions of default rules, written nominations, and threats against the Exchange are all consistent with a fear of default in a month when early barrels were desirable and Apex was short of oil. "All loadings must be at GATX" *could* mean the longs wanted to keep the pressure on Apex, but it is more reasonably considered innocuous in light of the fact that Apex itself had chosen GATX to make its deliveries. Significantly, Oliver later

> called Slifka to explicitly *reject* joint legal action by the oil firms against the Exchange. These notes may be Apex's best evidence, but they too are ambiguous and consistent with independent conduct.

(79a)

The Second Circuit disagreed with Judge Walker, and concluded that "a reasonable inference could be drawn that this notebook entry evidences an agreement between Slifka of Global and Oliver of Northeast to take the actions set forth in it" (22a). However, the Court did not make the analysis required by *Matsushita,* because it did not hold that (or even seek to determine whether) the inference of concerted action was *more* reasonable than the inference of independent action. See pp. 13-14, *infra.*

Next, the court pointed to certain notes of William Berberich of Belcher reflecting a separate conversation with Slifka on February 3 — *after* Belcher had submitted its nominations for delivery:

> — Penalty to start Fri. —
>
> — 10% after 5 days —
>
> — oil at 5 days —
>
> — Bring suit against exchange
>
> — Restraining order to prevent any further trades on Merc. (26a)

Based upon a so-called "striking" "similarity" between the Denihan and Berberich notes, the Court of Appeals concluded:

> If a finder of fact were to infer a conspiracy between Global and Northeast, a possibility we have concluded would be reasonable in light of Denihan's notebook entries, . . . it could reasonably conclude in light of Berberich's notebook entries regarding the Slifka conversation that Belcher also participated, . . . especially if we view the Slifka conversation in light of Berberich's

notations made two days earlier (e.g., "promote crunch" and "press for default").[14] (27a)

Respectfully, the Berberich notes of February 3, 1982 provide no evidence of the "likelihood of an illicit association" between Global, Northeast and Belcher. The first three entries in Berberich's notebook, namely, "penalty to start Fri.", "10% after 5 days", "oil at 5 days", merely recited what the very rules of the Exchange provided in the event of a default by a "short". Similarly, the remaining two entries, namely, "bring suit against exchange" and "restraining order to prevent any further trades on Merc" support, at best, an inference that the parties discussed matters of common concern. Notably, the District Court made an express finding below — which was *not* disturbed by the Court of Appeals — that a discussion of the foregoing subjects was "a predictable response to existing conditions," and reflected a natural conversation "between traders faced with a common concern: the possibility of an Apex default on deliveries." (79a).

What was critical to the Court of Appeals for the purposes of finding a possible conspiracy between Global and Northeast was the suggestion that "All loadings must be GATX".[15] Indeed, Apex had argued: "The agreement

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[14] Curiously, those earlier notations were expressly *rejected* by the Court as *not* supporting a finding of conspiracy. The Court of Appeals acknowledged that Belcher, alone, "could have harbored a reasonable expectation that it could 'squeeze' Apex by nominating its 315 contracts for the first minute of the delivery period." (26a); *see also,* (78a). Accordingly, these earlier notations were deemed to be without evidentiary value, since Belcher had neither reason nor need to join with anyone else to pressure Apex to deliver. *Accord, First Nat'l Bank* v. *Cities Service Co.*, 391 U.S. 253, 278-279 (1968), *cf., Illinois Corporate Travel, Inc.* v. *American Airlines, Inc.*, 806 F.2d 722, 726 (7th Cir. 1986) ("to show conspiracy indirectly the plaintiff must demonstrate that the firm is behaving in a way that is inconsistent with unilateral decisionmaking").

[15] "[T]he notebook entry seems to suggest that Northeast and Global may have agreed to insist on delivery of the oil at GATX" (23a).

between Northeast and Global that "all loadings must be GATX" *was essential* to pulling off the squeeze." (Apex Main Brief to Court of Appeals at 26; emphasis supplied.) That critical fact, of course — the apparent insistence that Apex deliver from GATX — is *not* mentioned, in *any* way, in the Berberich notes. To infer that holding Apex to deliver from the GATX site was what Slifka and Berberich discussed, and agreed upon, amounts to impermissible speculation and a misapplication of *Matsushita.*

1. *The Misapplication of Matsushita.*

Under *Matsushita,* "conduct as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy."[16] In the context of summary judgment in a case entirely dependent on circumstantial evidence, this principle necessitates a weighing of inferences which may be drawn from the evidence. This Court in *Matsushita* reversed precisely because the Third Circuit had failed to make the required inquiry: "the [Court of Appeals] apparently did not consider whether it was as plausible to conclude that petitioner's price-cutting behavior was independent and not conspiratorial." 106 S. Ct. at 135. And the dissent in *Matsushita* criticized the majority precisely for requiring this inquiry: "If the Court intends to give every judge hearing a motion for summary judgment in an antitrust case the job of determining if the evidence makes the inference of conspiracy more probable than not, it is overturning settled law." 106 S. Ct. at 1363-64 (White, J., dissenting).

The District Court clearly understood the majority's teaching in *Matsushita,* ruling that "ambiguous evidence,

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[16] See also *Cities Service,* 391 U.S. at 280, wherein this Court affirmed summary judgment in favor of Cities Service, holding that:

> the inference that Cities' failure to deal was the product of factors other than conspiracy [was] at least equal to the inference that it was due to conspiracy, thus negating the probative force of the evidence showing such a failure . . . .

because it is by definition incapable of a *dominant* inference, will not alone defeat a motion for summary judgment." (59a) (emphasis supplied).

The Second Circuit, however, applied a pre-*Matsushita* analysis: "while some assessing of the evidence is necessary in order to determine rationally what inferences are reasonable and therefore permissible, it is evident that the question of what weight should be assigned to competing permissible inferences remains within the province of the fact-finder at a trial" (18a). Thus, in holding that the Denihan notes gave rise to an inference of a Northeast-Global conspiracy, the Court said only that "a reasonable inference could be drawn that this notebook entry evidences an agreement between Slifka of Global and Oliver of Northeast to take the actions set forth in it." (22a). Presumably, a reasonable inference could also be drawn that there was no conspiracy — and that, as the District Court held, the conversation was a natural one between traders faced with the possibility of an Apex default on deliveries. (79a). In the absence of the required determination that the evidence was capable of a *dominant* inference of conspiracy, it was error to reverse the grant of summary judgment.[17]

In its analysis of the Berberich notes — the crucial evidence linking Belcher to the Northeast-Global conspiracy — the Second Circuit made several errors reflecting its failure to apply the proper *Matsushita* analysis. *First*, the court noted that "once a conspiracy is shown, only 'slight evidence' is needed to link another defendant with it" (26a). By mandate of this Court, however, Apex, faced with defendants' denials, was required to come forward not with

[17] The Court of Appeals also stated that petitioners' evidence suggesting a loss of priority if they showed flexibility "merely represents evidence disputing the inference which can be drawn from the notebook entry" (23a). This statement further confirms that the Court did not consider whether, in light of all of the evidence, the notebook entry was capable of a *dominant* inference of conspiracy.

so-called "slight evidence", but rather with "significant probative evidence, which tends to exclude the possibility that the alleged conspirators acted independently."[18] *Cities Service*, 391 U.S. at 277-88; *Modern Home Institute, Inc.* v. *Hartford Accident & Indemnity Co.*, 513 F.2d 102 (2d Cir. 1975); *Reborn Enterprises, Inc.* v. *Fine Child, Inc.*, 590 F. Supp. 1423 (S.D.N.Y. 1984), *aff'd*, 754 F.2d 1072 (2d Cir. 1985). The Second Circuit thus relied on an inapplicable standard, and impermissibly bootstrapped its finding of a Global-Northeast conspiracy into an inference of Belcher's participation.

Second, as to the "evidence" against Belcher, the Court again held that a finder of fact "could reasonably conclude in light of Berberich's notebook entries regarding the Slifka conversation that Belcher also participated [in a Global-Northeast conspiracy]" (27a). Yet the opposite inference is at least equally "reasonable" for reasons explained by Judge Walker and discussed above (at pp. 10-11). Unless the evidence is capable of a *dominant* inference of concerted action, it is not probative of concerted action.

Third, the Court of Appeals improperly relied upon evidence of motive to buttress otherwise ambiguous evidence. The Court found an inference of concerted action to be "reasonable" when viewed "in light of Berberich's notations made two days earlier (e.g., "promote crunch" and "press

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[18] In connection with its motion for summary judgment, Belcher submitted an affidavit by an officer with knowledge of Belcher's actions in the February Contracts. Belcher denied under oath that it had conspired with any alleged co-conspirator and that it had discussed with any other defendant the times chosen to accept delivery of oil in February 1982, the price or terms on which it would deal with Apex, or the withholding of oil from Apex. Belcher's affidavit, like those of the other "longs", stated that each company developed, submitted, and maintained its nominations independently.

Having made the required showing, the burden shifted to Apex to present admissible evidence showing the existence of a genuine issue of material fact. *Celotex Corp.* v. *Catrett*, 477 U.S. 317, 106 S. Ct. 2548, 2552-54 (1986).

for default"). (27a). While the Court of Appeals seems to suggest that the presence of a motive to harm Apex may be probative, such evidence cannot support an inference of conspiracy. A footnote at the end of *Matsushita* squelches any such suggestion:

> We do not imply that, if [the defendants] had had a plausible reason to conspire, ambiguous conduct could suffice to create a triable issue of conspiracy. Our decision in *Monsanto* . . . establishes that conduct that is as consistent with permissible competition as with illegal conspiracy does not, without more, support even an inference of conspiracy.

106 S. Ct. at 1362, n. 21. When conduct can be explained equally by independent action or conspiracy, then evidence that the defendants had a motive to conspire is insufficient to create a jury issue — that is, evidence of motive does not sufficiently " 'tend[] to exclude the possibility' " of nonconspiratorial conduct to defeat a motion for summary judgment.

Indeed, elsewhere, the Court of Appeals recognized that a motive to "get" Apex "creates an equally valid inference of independent action." (20a). At the end of its opinion, the Court of Appeals stated:

> [A]s each defendant became aware of the early nominations by the others, the advantages of inflexibility as to delivery date and location became evident. Since the early nominations became public knowledge, it became evident to anyone in the business that a profit could be made by forcing Apex to deliver. Thus, any motivation to "get" Apex gives rise to an inference of individual action which is equally as plausible as an inference of conspiracy. We therefore conclude that the long defendants' alleged motivation cannot succeed in establishing a conspiracy on the evidence herein. (31a).

Accordingly, Belcher's alleged motivation cannot buttress the otherwise ambiguous evidence of concerted action.

2. *The Absence of Actions Against Self-Interest.*

In actions such as this based upon circumstantial evidence of parallel conduct, a plaintiff must show not simply parallel behavior, but also "plus factors," including actions against economic interest. *Modern Home Institute,* 513 F.2d at 111. *Compare Kreuzer* v. *American Academy of Periodontology,* 735 F.2d 1479, 1487 (D.C. Cir. 1984) (evidence of interconspirator communications together with parallel conduct insufficient evidence of conspiracy); *Impro Products, Inc.* v. *Herrick,* 1982-2 Trade Cas. (CCH) ¶ 64.906 (S.D. Iowa 1982), *aff'd,* 715 F.2d 1267 (8th Cir. 1983), *cert. denied,* 465 U.S. 1026 (1984) (evidence of motive to conspire, communications among conspirators and parallel conduct insufficient).

Significantly, the Court of Appeals found the evidence amassed by Apex concerning actions against economic interest to be ambiguous. As to the early nominations, the Court pointedly stated that "the demand of early delivery, by itself, creates no dominant inference." (24a) Similarly, the Court noted that since early nominations became public knowledge, it would be consistent with permissible competition for a long to be inflexible, *i.e.,* to maintain its nomination. (31a).

The Court of Appeals further found nothing conspiratorial in the *content* of the Berberich notes; its analysis, which is limited to facial "similarity" of Berberich's and Denihan's notes, is but a description of parallel conduct, equally explainable by non-conspiratorial inferences. The Second Circuit's reliance upon parallel conduct alone, in the absence of any unambiguous evidence of action taken against economic self-interest, is inconsistent with the teachings of *Matsushita.* To infer concerted action in the absence of direct evidence of collusion requires a showing that the conduct is not in the individual self-interest of the participants, acting

independently, and is in their collective and self interest only when they coordinate their actions. No such showing was made here.

3. *Conflict Among the Circuits.*

The Second Circuit's opinion places it in conflict with decisions of the other Circuit Courts which have applied the *Matsushita* test in antitrust conspiracy cases. The Fourth, Seventh, Ninth and Tenth Circuits have all correctly applied the *Matsushita* standard in this context and have required that the plaintiff's evidence be capable of a dominant inference of concerted action in the face of competing inferences of independent action. *See, e.g., Key Financial Planning Corp.* v. *ITT Life Insurance Corp.*, No. 84-2800 (10th Cir. Aug. 28, 1987) (LEXIS, Genfed library, USApp file) (affirming summary judgment for defendant ITT, holding evidence that one agent recommended plaintiff be terminated was "at least as consistent with the permissible independent interests of the defendants . . . as to have illegally conspired in that regard . . ."); *Valley Liquors, Inc.* v. *Renfield Importers, Ltd.*, 822 F.2d 656 (7th Cir. 1987) (summary judgment for defendant liquor importer and competing distributors affirmed, holding that there was no evidence tending to exclude possibility that importer terminated plaintiff in own self-interest despite evidence of separate meetings between importer and each of the competitors regarding their futures as distributors); *White* v. *Rockingham Radiologists, Ltd.*, 820 F.2d 98 (4th Cir. 1987) (summary judgment for defendant hospital affirmed, holding evidence did not tend to exclude the possibility that the alleged conspirators acted independently); *O.S.C. Corp.* v. *Apple Computer, Inc.*, 792 F.2d 1464 (9th Cir. 1986) (summary judgment for defendant manufacturer affirmed where the evidence showed that, as a result of complaints from dealers, defendant banned mail-order sales and terminated dealers who violated the ban. "Mere competitors' complaints plus termination of noncomplying dealer are insufficient to raise an inference of unlawful conspiracy or combination . . .")

Richards v. *Neilsen Freight Lines*, 810 F.2d 898 (9th Cir. 1987) is particularly instructive. There, plaintiff was a local trucking company that hauled to local destinations shipments turned over to it by defendant long-haul carriers. Plaintiff claimed that defendants had conspired to boycott local carriers who solicited orders directly from their customers, pointing to the testimony of the president of one of the defendants of a "gentlemen's agreement that we won't back solicit." The Court of Appeals affirmed summary judgment for defendants, reasoning that each defendant had a legitimate reason for terminating local-delivery carriers that back solicited its customers, and that there was no evidence from which a jury could find that it was more likely that the termination was the result of an unlawful conspiracy than of legitimate independent action.

In *Richards*, the Ninth Circuit clearly held that inquiry into the "reasonableness" of an inference of conspiracy—the very test adopted by the Second Circuit—is not appropriate, since the test is one of the dominance of such inference:

> Foothills notes the district court's finding, made when denying plaintiff's motion for summary judgment, that a reasonable person might infer a horizontal conspiracy from the evidence. This statement is, however, dicta insofar as the court needed to make no such finding to deny Foothills' motion.

810 F.2d at 903. As to the "gentlemen's agreement" not to back solicit, the court noted "at least three interpretations of the deposition testimony are possible" *id.*, only one of which would be of a horizontal agreement as alleged by plaintiff. The Court concluded:

> We agree with the district court's conclusion, and reject Foothills' contention that in reaching it the court engaged in an impermissible weighing of competing inferences. *See Barnes*, 759 F.2d at 681. If a jury verdict were based on the "gentlemen's agreement" testimony, it necessarily would be speculative. *See id* . . . The fact

> that many, if not all, firms in an industry react similarly to a particular practice does not evidence an industry-wide agreement when there is a legitimate business purpose for each firm's behavior.

Id. at 903-904. Thus, the Ninth Circuit did what the Second Circuit here did not, namely, it weighed all competing inferences to determine whether the evidence was capable of a dominant inference of concerted action.

Contrary to the other circuits which have correctly applied *Matsushita*, the Second Circuit has improperly shifted the burden, so as to deny summary judgment where an inference of independent action is equal to (or weaker than) the inference of concerted action. This reasoning violates the standards set down by this Court and applied by the other Circuit Courts, undermining the salutary policy embodied in *Matsushita* of dismissing marginal cases of alleged conspiracy. A writ should thus issue to correct this misapplication of *Matsushita* by the Second Circuit.

II.

CERTIORARI SHOULD BE GRANTED TO REVIEW THE PROPRIETY OF THE COURT OF APPEALS' RELIANCE ON HEARSAY IN PERMITTING AN INFERENCE OF MEMBERSHIP IN AN ANTITRUST CONSPIRACY.

As noted in Point I, *supra*, the Second Circuit allowed an inference of conspiracy to be drawn from the Denihan notes such as to create a factual issue as to the existence of a conspiracy between Global and Northeast. It was, of course, to this conspiracy that Belcher was tied by "slight evidence." (26a) The Court's reliance upon the Denihan notes — which are nothing more than uncorroborated hearsay — runs afoul of this Court's most recent pronouncement in *Bourjaily* v. *United States*, — U.S. —, 107 S. Ct. 2775 (1987).

Rule 801(d)(2)(E) of the Federal Rules of Evidence provides an exception to the hearsay exclusion for the statements of co-conspirators. Specifically, it provides

> A statement is not hearsay if
>
> (2) . . . . The statement is offered against a party and is . . . . (E) a statement by a co-conspirator of a party during the course and in furtherance of the conspiracy.

In order to come within this exception to the hearsay exclusion, it must be established that there was a conspiracy and that the statements were made by a co-conspirator in furtherance of the conspiracy.

Prior to *Bourjaily*, it was well settled in the Second Circuit that there must exist "a fair preponderance of evidence independent of a co-conspirator's hearsay utterances" before such hearsay may be used to prove the defendant's membership in a conspiracy. *United States* v. *Geaney*, 417 F.2d 1116, 1119-20 (2d Cir. 1969), *cert. denied sub nom. Lynch* v. *United States*, 397 U.S. 1028 (1970); *United States* v. *Terry*, 702 F.2d 299, 320 (2d Cir.), *cert. denied sub nom. Williams* v. *United States*, 461 U.S. 931 (1983). This requirement was believed necessary to prevent the circumstance where "co-conspiracy hearsay 'would lift itself by its own bootstraps to the level of competent evidence' [citation omitted], and thus assume the conclusion to be proven, in this case . . . membership in the conspiracy." *Terry*, 702 F.2d at 320, *quoting Glasser* v. *United States*, 315 U.S. 60, 7475 (1942).

In *Bourjaily*, this Court declined to follow *Glasser* v. *United States*, *supra*, upon which *Geaney* had relied, as it predated the Federal Rules of Evidence, which provide that preliminary determinations of admissibility are in the province of the court. Rule 104, Fed. R. Ev. This Court, however, did *not* dispute the underlying rationale of *Glasser*, which, fundamentally, sought to prevent the prejudice in admission of this type of evidence without any corroboration of its reliability.

Accordingly, while stating that a court, in exercising its powers under Rule 104, Fed. R. Ev., may consider co-conspirator hearsay, the Court also clearly stated that "when the preliminary facts relevant to Rule 801(d)(2)(E) are disputed, the offering party must prove them by a *preponderance* of the evidence." *Bourjaily*, 107 S. Ct. at 2779 (emphasis supplied.) Moreover, this Court *did not hold* that, in making the factual determination for purposes of Rule 801(d)(2)(E), a court may look *exclusively* to uncorroborated hearsay statements. 107 S. Ct. at 2781-82. Indeed, Justice Stevens, in his concurring opinion, went so far as to state:

> An otherwise inadmissible hearsay statement cannot provide the sole evidentiary support for its own admissibility — it cannot lift itself into admissibility entirely by tugging on its own bootstraps. It may, however, use its own bootstraps, together with other support, to overcome the objection.

Id. at 2783.

The majority as well was concerned that hearsay evidence be reliable and that, at a minimum, "unreliable hearsay" not be allowed to "bootstrap" itself into admissibility against a third party. The Court thus tied reliability to the issue of corroboration:

> *First, out-of-court statements are only presumed unreliable. The presumption may be rebutted by appropriate proof.* See Fed. Rule Evid. 803(24) (otherwise inadmissible hearsay may be admitted if circumstantial guarantees of trustworthiness demonstrated). Second, individual pieces of evidence, insufficient in themselves to prove a point, may in cumulation prove it. The sum of an evidentiary presentation may well be greater than its constituent parts. Taken together, these two propositions demonstrate that *a piece of evidence, unreliable in isolation, may become quite probative when corroborated by other evidence.*

Id. at 2781 (emphasis supplied).

The cases interpreting *Bourjaily* have recognized this limitation, and have utilized hearsay only where corroborated by other evidence. *See, United States* v. *Martinez*, 825 F.2d 1451 (10th Cir. 1987); *United States* v. *Shoffner*, 826 F.2d 619 (7th Cir. 1987); *United States* v. *Nersesian*, 824 F.2d 1294 (2d Cir. 1987). See also *United States* v. *Hernandez*, No. 86-1339 (10th Cir. Sept. 22, 1987) (LEXIS, Genfed library, USApp file).

Here, the evidence relied upon by the Court of Appeals to infer Belcher's membership in a conspiracy was the hearsay statement in Denihan's notes.[19] That hearsay was uncorroborated since, as conceded by the Court of Appeals, the Berberich notes, in themselves, did not permit an inference of concerted action; nor was their mere facial similarity to the Denihan notes probative, since it is equally possible to infer independent action from parallel conduct.[20] Unlike the conduct of the petitioner in Bourjaily (which conduct plainly corroborated the hearsay utterances offered against him),[21] no evidence of Belcher's conduct, or the conduct of anyone else, corroborated Denihan's notes.

Under these circumstances, the Denihan notes should have been presumed unreliable, unless the presumption was "rebutted by appropriate proof." There being no such proof, they could not, under *Bourjaily*, form the evidentiary basis for inferring Belcher's membership in a conspiracy.

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[19] Indeed, the Denihan notes are double hearsay as to Belcher, since, at best, they contain Denihan's notations of a separate conversation between Oliver and Slifka. See p. 9, fn. 13, *supra.*

[20] For the Court of Appeals, it was the seeming inculpatory content of the Denihan notes ("the notebook entry seems to suggest that Northeast and Global may have agreed to insist on delivery of the oil at GATX", 23a) which permitted the inference of conspiracy when compared with the Berberich notes.

[21] Petitioner "showed up at the prearranged spot at the prearranged time. He picked up the cocaine, and a significant sum of money was found in his car." 107 S. Ct. at 2781.

CONCLUSION

For the foregoing reasons, petitioners respectfully pray that the Court issue a writ of certiorari to review the judgment of the Court of Appeals for the Second Circuit.

October 19, 1987

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

THE COASTAL CORPORATION,
COASTAL STATES MARKETING, INC.,
BELCHER OIL COMPANY,
THE BELCHER COMPANY OF NEW YORK, INC.,
BELCHER NEW ENGLAND, INC. and
BELCHER NEW JERSEY, INC.,

Petitioners,

v.

APEX OIL COMPANY,

Respondent.

APPENDIX

15 U.S.C. § 1. Trusts, etc., in restraint of trade illegal; exception of resale price agreements; penalty

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal: *Provided*, That nothing contained in sections 1 to 7 of this title shall render illegal, contracts or agreements prescribing minimum prices for the resale of a commodity which bears, or the label or container of which bears, the trademark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions, under any statue, law or public policy now or hereafter in effect in any State, Territory, or the District of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale, and the making of such contracts or agreements shall not be an unfair method of competition under section 45 of this title: *Provided further*, That the preceding proviso shall not make lawful any contract or agreement, providing for the establishment or maintenance of minimum resale prices on any commodity herein involved, between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each other. Every person who shall make any contract or engage in any combination or conspiracy declared by sections 1 to 7 of this title to be illegal shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

July 2, 1890, c. 647, § 1, 26 Stat. 209; Aug. 17, 1937, c. 690, Title VIII, 50 Stat. 693; July 7, 1955, c.281, 69 Stat.282.

15 U.S.C. § 2. Monopolizing trade a misdemeanor; penalty

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

July 2, 1890, c.647 § 2, 26 Stat. 209; July 7, 1955, c. 281, 69 Stat. 282.

7 U.S.C. § 6b. Contracts designed to defraud or mislead; bucketing orders; buying and selling orders for commodities

It shall be unlawful (1) for any member of a contract market, or for any correspondent, agent, or employee of any member, in or in connection with any order to make, or the making of, any contract of sale of any commodity in interstate commerce, made, or to be made, on or subject to the rules of any contract market, for or on behalf of any other person, or (2) for any person, in or in connection with any order to make, or the making of, any contract of sale of any commodity for future delivery, made, or to be made, on or subject to the rules of any contract market, for or on behalf of any other person if such contract for future delivery is or may be used for (a) hedging any transaction in interstate commerce in such commodity or the products or by-products thereof, or (b) determining the price basis of any transaction in interstate commerce in such commodity, or (c) delivering any such commodity sold, shipped, or received in interstate commerce for the fulfillment thereof—

(A) to cheat or defraud or attempt to cheat or defraud such other person;

(B) willfully to make or cause to be made to such other person any false report or statement thereof, or willfully to enter or cause to be entered for such person any false record thereof;

(C) willfully to deceive or attempt to deceive such other person by any means whatsoever in regard to any such order or contract or the disposition or execution of any such order or contract, or in regard to any act of agency performed with respect to such order or contract for such person; or

(D) to bucket such order, or to fill such order by offset against the order or orders of any other person, or willfully and knowingly and without the prior consent of such person to become the buyer in respect to any selling order for such person, or become the seller in respect to any buying order of such person.

Nothing in this section or in any other section of this chapter shall be construed to prevent a futures commission merchant or floor broker who shall have in hand, simultaneously, buying and selling orders at the market for different principals for a like quantity of a commodity for future delivery in the same month, from executing such buying and selling orders at the market price: *Provided*, That any such execution shall take place on the floor of the exchange where such orders are to be executed at public outcry across the ring and shall be duly reported, recorded, and cleared in the same manner as other orders executed on such exchange: *And provided further*, That such transactions shall be made in accordance with such rules and regulations as the Commission may promulgate regarding the manner of the execution of such transactions.

Sept. 21, 1922, c. 369, § 4b, as added June 15, 1936, c. 545, § 5, 49 Stat. 1493, and amended Feb. 19, 1968, Pub.L. 90-258, § 5, 82 Stat. 27; Oct. 23, 1974, Pub.L. 93-463, Title IV, § 405, 88 Stat. 1413.

7 U.S.C. § 13b. Manipulations or other violations; cease and desist orders against persons other than contract markets; punishment; misdemeanor or felony; separate offenses

If any person (other than a contract market) is manipulating or attempting to manipulate or has manipulated or

attempted to manipulate the market price of any commodity, in interstate commerce, or for future delivery on or subject to the rules of any contract market, or otherwise is violating or has violated any of the provisions of this chapter or of the rules, regulations, or orders of the Commission thereunder, the Commission may, upon notice and hearing, and subject to appeal as in other cases provided for in section 9 of this title, make an enter an order directing that such person shall cease and desist therefrom and, if such person thereafter and after the lapse of the period allowed for appeal of such order or after the affirmance of such order, shall fail or refuse to obey or comply with such order, such person shall be guilty of misdemeanor and, upon conviction thereof, shall be fined not more than $100,000, or imprisoned for not less than six months nor more than one year, or both, except that if such failure or refusal to obey or comply with such order involves any offense within paragraph (a) or (b) of section 13 of this title, such person shall be guilty of felony and, upon conviction thereof, shall be subject to the penalties of said paragraph (a) or (b): *Provided*, That any such cease and desist order against any respondent in any case of manipulation of, or attempt to manipulate, the price of any commodity shall be issued only in conjunction with an order issued against such respondent under section 9 of this title. Each day during which such failure or refusal to obey or comply with such order continues shall be deemed as a separate offense.

Sept. 21, 1922, c. 369, § 6(c), as added Feb. 19, 1968, Pub.L. 90-258, § 17, 82 Stat.31, and amended Oct. 23, 1974, Pub.L 93-463, Title I, § 103(a), (b), Title II, § 212(c),88 Stat. 1392, 1404.

7 U.S.C. § 13c. Responsibility as principal; minor violations

(a) Any person who commits, or who willfully aids, abets, counsels, commands, induces, or procures the commission of, a violation of any of the provisions of this chapter, or any of the rules, regulations or orders issued pursuant to this chapter, or who acts in combination or concert with any

other person in any such violation, or who willfully causes an act to be done or omitted which if directly performed or omitted by him or another would be a violation of the provisions of this chapter or any of such rules, regulations, or orders may be held responsible in administrative proceedings under this chapter for such violation as a principal.

Sept. 21, 1922, c. 369, § 13, as added Feb. 19, 1968, Pub.L. 90-258 § 26, 82 Stat. 34, and amended Oct. 23, 1974, Pub.L. 93-463, Title I, § 103(b), 88 Stat. 1392.

Rule 801. Definitions

(d) Statements which are not hearsay. A statement is not hearsay if—

(2) Admission by party-opponent. The statement is offered against a party and is

(E) a statement by a coconspirator of a party during the course and in furtherance of the conspiracy.

(As amended Pub.L. 94-113, § 1, Oct. 16, 1975, 89 Stat. 576; Mar. 2, 1987, eff. Oct. 1, 1987.)

United States Court of Appeals

FOR THE SECOND CIRCUIT

No. 737 August Term, 1986

(Argued: February 6, 1987 Decided: June 17, 1987)

APEX OIL COMPANY,
Plaintiff-Appellant,

v

JOSEPH DIMAURO, TRIAD PETROLEUM, INC., TIC COMMODITIES, INC., COASTAL CORPORATION, COASTAL STATES MARKETING, INC., BELCHER OIL COMPANY, THE BELCHER COMPANY OF NEW YORK, INC., BELCHER NEW ENGLAND, INC., BELCHER NEW JERSEY, INC., STINNES CORPORATION, STINNES INTEROIL, INC., EASTERN OF NEW JERSEY, INC., NORTHEAST PETROLEUM INDUSTRIES, INC., NORTHEAST PETROLEUM CORPORATION, GEORGE E. WARREN CORPORATION, NEW YORK MERCANTILE EXCHANGE AND JULIAN RABER,
Defendants-Appellees.

Docket No. 86-7898

BEFORE:

PIERCE AND ALTIMARI, *Circuit Judges*, and SPRIZZO, *District Judge.*[1]

[1] Hon. John E. Sprizzo, Judge, United States District Court for the Southern District of New York, sitting by designation.

Appeal from an order of the United States District Court for the Southern District of New York (Walker, J.) which granted appellees' motions for summary judgment in this complex antitrust case.

Affirmed in part, reversed in part and remanded.

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(Julius Berman, Phillip A. Geraci, Kaye, Scholer, Fierman, Hays & Handler, New York, New York, of counsel), *for Defendant-Appellee Julian Raber.*

PIERCE, *Circuit Judge*:

In this appeal we are called upon to review a grant of summary judgment in a complex antitrust conspiracy case.

This litigation arises out of the circumstances surrounding the settling of February 1982 futures contracts for No. 2 home heating oil. Simply stated, plaintiff-appellant Apex Oil Company ("Apex") alleges that defendants-appellees, which include competing oil companies, a broker, the New York Mercantile Exchange (the "Exchange"), and an officer of the Exchange named Julian Raber, conspired to force Apex to deliver much of the oil it had agreed to deliver in February 1982 in the first three delivery days of that month at one delivery site. Apex alleged that this behavior made it impractical or impossible for Apex to deliver on time and forced Apex to pay premium prices

to other oil companies, including defendants, to obtain oil for delivery to defendants in order to avoid a default.

I. INTRODUCTION

Since this action centers upon a series of events surrounding the futures market for No. 2 heating oil for February 1982, it is helpful to outline the workings of the commodities futures market.

In brief, a commodity futures contract entitles the buyer of the contract (the "long") to purchase from the seller of the contract (the "short") a set quantity of some commodity at a set date in the future. Typically, all of the terms of the contract, except price, are standardized under the rules of an exchange. The price is negotiated on the floor of the exchange.

This case concerns futures contracts for No. 2 heating oil sold on the Exchange. On the Exchange, one futures contract for No. 2 oil consists of a contract to deliver 1000 barrels (42,000 gallons) of oil in New York Harbor at a set price during some future month.

Most contracts, however, never result in actual delivery since the market is used by many investors for speculation. Speculation is made possible by allowing holders of long or short "positions" to "liquidate" those positions by purchasing or selling the necessary contracts. For example, a holder of short contracts who does not wish to deliver oil may buy a number of long contracts equal to the number of short contracts he or she holds. Similarly, a long who does not wish to take delivery of the oil may enter into short contracts equal in number to the number of long contracts held. The speculator makes a profit or suffers a loss based on the differences in the prices paid for the long and short contracts.

Many actors take part in the market for No. 2 heating oil futures. A futures commission merchant or broker executes the desires of the actual buyers or sellers of contracts by requesting a member of the Exchange ("clearing member") to enter into the transaction through a floor broker on the

floor of the Exchange. The Exchange functions as a "clearing house," acting as a buyer to all sellers and a seller to all buyers thereby enabling an investor who wishes to buy or sell a contract to find a partner.

When trading is closed for contracts for a particular month, the Exchange determines which persons hold long positions and which persons hold short positions by offsetting each trader's long contracts and short contracts. The Exchange then matches the longs with the shorts for the purpose of delivery. Under rules discussed below, the matched parties work out the time, place and method of delivery. Delivery may still be avoided by means of an "exchange futures for product" transaction ("EFP"). In an EFP, the parties agree to supersede the futures contract with a new contract to deliver oil on the cash ("wet") market. If the holder of a short positions defaults, i.e., fails to deliver timely, the Exchange rules provide for fines and other sanctions.

II. BACKGROUND

In light of the complexity and mass of material presented by the parties herein, we briefly summarize what appear to us to be undisputed facts concerning the subject February 1982 No. 2 heating oil contracts.

The rules of the Exchange provided that any February contracts not liquidated by Friday, January 29, 1982—the close of trading for such contracts—would be matched, long with short, for the purpose of delivery (or EFP). At the close of trading, Apex was short 4,378 contracts. In other words, Apex had agreed to deliver 4,378 contracts (183,876,000 gallons) of oil in February 1982. The total number of outstanding contracts designated for delivery by all persons holding short positions, including Apex, was 4,906.

Of the 4,906 contracts open at the close of trading, 1,945 were held by a number of oil companies and their affiliates

who were named as defendants herein[2] (the "long defendants"):

Northeast	748
Global	362
Belcher	315
Stinnes	300
Warren	170
Eastern	50

As required by Exchange rules, on February 1, 1982, Apex selected a delivery site through its broker and clearing member Goldman Sachs & Co. ("Goldman"). For 4,281 of its 4,378 contracts, it selected GATX terminal in Carteret, New Jersey, as the delivery site. Apex designated B.P. terminal at Tremley Point, New Jersey, as the delivery site for the remaining contracts. On the same day, also pursuant to

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[2] The long defendants are:

1. Northeast Petroleum Corporation and Northeast Petroleum Industries, Inc. (collectively "Northeast"). Apex and Northeast settled this case after argument and this appeal was dismissed as to Northeast in May 1987.

2. Global Petroleum Corporation ("Global"). Pursuant to a stipulation and order filed on November 22, 1983, this action was "discontinued" as to Global with prejudice.

3. Coastal Corporation, Coastal States Marketing, Inc., Belcher Oil Company, The Belcher Company of New York, Inc., Belcher New England, Inc., and Belcher New Jersey, Inc. (collectively "Belcher").

4. Stinnes Corporation and Stinnes Interoil, Inc. (collectively "Stinnes").

5. George E. Warren Corporation ("Warren").

6. Eastern of New Jersey, Inc. ("Eastern").

The other defendants include:

1. Joseph DiMauro, a broker in the commodities futures market and the cash ("wet") market for No. 2 heating oil.

2. Triad Petroleum, Inc. ("Triad"), DiMauro's brokerage firm for transactions on the wet market.

3. TIC Commodities, Inc. ("TIC"), DiMauro's brokerage firm for transactions on the futures market.

4. The New York Mercantile Exchange (the "Exchange") and Julian Raber ("Raber"), the vice chairman of the Exchange (collectively the "Exchange defendants").

Exchange rules, each long defendant submitted "Notice of Intention to Accept Petroleum Products Futures." The clearing house then matched up longs and shorts for delivery. All of the open long positions held by the long defendants, except for fifteen contracts to be delivered to Warren, were designated by the Exchange for delivery by Apex.

The Exchange rules then required each long to nominate a delivery date and method by 4:30 p.m. on February 5. Deliveries could be requested by pipeline, intra-facility transfer, inter-facility transfer, inventory (also known as book) transfer, tanker, barge or truck. Inventory transfer entails transfer of title of oil without actually moving or delivering it.

The rules then in effect stated that "[t]he buyer shall give written delivery or loading instructions," that "[a]ll deliveries must be completed after the fifth business day and before the last business day of the delivery month," and that in the case of barge or tanker delivery, "[t]he seller must supply the product as soon as the barge or tanker reports readiness to load," or in the case of onshore delivery, "as soon as the buyer reports the transfer facility or truck is ready to accept the product." Herein, the first day for which the long defendants could demand delivery was February 6.

Prior to February 1982, the nominations by holders of long positions typically were spread throughout the month. Moreover, it was not unusual for long and short parties to be somewhat flexible in the actual timing and location of delivery. For example, in December 1981 and January 1982, the nominations of the long defendants were spread fairly evenly throughout each month. The actual delivery dates differed from the nominated dates for roughly two-thirds of the nominations. The actual delivery method was changed in two-thirds of the nominations. The actual location for delivery differed in nearly one-third of the nominations. Thus, although the rules apparently allowed longs to rigidly demand delivery at a particular time and place, in practice the longs were not always inflexible.

According to Apex, this pattern was broken in February 1982. Apex alleges that the long defendants, aided by DiMauro, a broker, and by the Exchange and Raber, conspired to nominate an inordinate number of their contracts for the first three delivery days of February. There is no dispute that the defendants actually did nominate a large number of contracts for the first few days. Indeed, in over 75% of the long defendants' 1,945 nominations, delivery was demanded for one of the first three delivery days. Significantly, fewer than 25% of long positions held by nondefendants were nominated for the first three days. Further, our calculations indicate that while over half of the contracts held by defendants were nominated for the first day of delivery, only about 10% of contracts held by nondefendants were nominated for the first day. Apex alleges, and the defendants deny, that a conspiracy among the defendants was responsible for this nomination pattern.

There is evidence that on February 3, a broker representing several long interests passed along a rumor on the Exchange floor that Apex would not be able to make delivery. That afternoon, the Exchange Control Committee convened for the purpose of resolving any market problem. Apparently, the broker repeated his statement regarding the possibility of an Apex default and also stated that "one or two" of his customers were "out to get Apex." The record indicates that similar rumors circulated among a number of other brokers and oil companies.

On the next day, February 4, Apex's broker, Goldman, represented to the Exchange Control Committee that Apex would not default, claiming that it expected to receive 750,000 barrels from Amoco and that it expected to have another 400,000 barrels available at GATX. However, on February 5, Goldman told the committee that Apex no longer expected to have the oil available at GATX for deliveries nominated for February 6, 7 or 8. Apex apparently only had available approximately 30,000 barrels of No. 2 oil at GATX on February 5.

Meanwhile, on February 4 and 5 the Exchange Control Committee asked several clearing members to suggest that their customers holding long positions agree to change delivery dates and sites. Apex alleges that its own requests to change delivery dates, methods or sites were either ignored or rejected by the long defendants. The long defendants do not appear to contest this allegation. Apex further alleges that this inflexibility was the result of a conspiracy among the defendants to "squeeze" Apex by forcing it to deliver an enormous amount of oil on short notice. As a result of this inflexibility, Apex claims that it was forced to purchase oil from the long defendants at inflated prices in order to meet its delivery obligations. Indeed, there is evidence that while the closing price for February contracts was 89.7¢ per gallon, Apex paid prices as high as 97.5¢ per gallon to several long defendants for oil that was immediately delivered back to the long defendants to satisfy Apex's delivery obligations. These purchases of oil enabled Apex to avoid a default.

III. THE CLAIMS ALLEGED

The gravamen of Apex's claims is that the defendants conspired to "squeeze" Apex: the long defendants, DiMauro, TIC, and Triad did so by manipulating the market; Raber and the Exchange by assisting or failing to prevent the other defendants from manipulating the market. The amended complaint asserts eight "claims for relief," which can be placed into four categories.

1. *Antitrust Conspiracy.* Apex alleges four Sherman Act claims; treble damages are requested. Three claims allege violations of section 1 of the Act and one alleges a violation of section 2. *See* 15 U.S.C. §§ 1, 2.

The first claim asserts that the long defendants and the exchange defendants conspired to nominate for early delivery in violation of section 1 of the Act. The early nominations allegedly enabled the long defendants to "manipulate, raise, maintain, stabilize and/or fix the price of No. 2 Heating Oil" by creating an "artificial shortage." Amended Complaint ¶¶ 46-52; *see* 15 U.S.C. § 1.

The second claim alleges that the long defendants conspired to refuse to deal with Apex by refusing to sell No. 2 oil to Apex, thereby weakening Apex's position as a competitor and creating an artificially high price for the oil. Amended Complaint ¶¶ 53-59; *see* 15 U.S.C. § 1.

The third claim asserts that the long defendants conspired to prevent other sources of No. 2 oil from supplying it to Apex, thereby artificially raising the price for the oil. Amended Complaint ¶¶ 60-64; *see* 15 U.S.C. § 1.

The fourth claim alleges that the long defendants conspired to monopolize the wet market for No. 2 oil available for delivery in New York Harbor during early February 1982, thereby causing Apex to pay artificially high prices for such oil. Complaint ¶¶ 65-69; *see* 15 U.S.C. § 2.

2. *Commodities Manipulation.* The fifth claim in the amended complaint alleges that the long defendants violated sections 9(b) and 13(a) of the Commodity Exchange Act ("CEA") by manipulating the price of oil and that all the defendants violated the CEA by spreading false reports about Apex. Amended Complaint ¶¶ 70-79; *see* 7 U.S.C. §§ 13(b), 13c(a). This claim apparently has been abandoned with respect to the Exchange defendants.

3. *Failure to Regulate.* The seventh claim in the amended complaint asserts that the exchange defendants failed to regulate properly the activities of brokers, traders and others with respect to the trading and delivery of oil during the period in question, thus violating the Commodity Exchange Act and regulations thereunder. Amended Complaint ¶¶ 86-91; *see* 7 U.S.C. §§ 7a(8), 7(d).

4. *Fraud.* The sixth claim alleges fraud under the Commodity Exchange Act, *see* 7 U.S.C. §§ 6b, 13c(a), and the eighth claim alleges common law fraud by the long defendants. Amended Complaint ¶¶ 80-85, 92-97.

Discovery on all the claims having been completed, all the defendants moved for summary judgment dismissing all the claims. The district court granted the motions and entered

judgment dismissing the amended complaint. *See Apex Oil Co. v. DiMauro*, 641 F. Supp. 1246 (S.D.N.Y. 1986).

We affirm in part, reverse in part and remand.

IV. DISCUSSION

A. The Antitrust Claims

The principal issue in this appeal is whether Apex has produced enough evidence in support of the claimed conspiracy to survive defendants' motions for summary judgment. These motions with respect to the antitrust claims were aimed only at this issue and the district court's grant of the motions was founded upon the district court's perception of a lack of evidence of a conspiracy. While we agree with the district court that, despite the great mass of evidence presented by Apex, the evidence of conspiracy is insufficient as to most of the defendants, we conclude that sufficient evidence has been presented for the case to proceed as to one defendant.

A motion for summary judgment shall be granted if "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). Herein, we focus primarily on the first part of the test: whether there is an issue of fact as to the existence of a conspiracy.

The movant bears the initial burden of demonstrating "the absence of a genuine issue as to any material fact." *See Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157 (1970). This may consist simply of pointing out that the plaintiff has failed to present any evidence to establish a necessary element of the cause of action. *See Celotex Corp. v. Catrett*, 106 S. Ct. 2548, 2552-53 (1986). In response, the non-moving party must then "set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e); *see Celotex Corp.*, 106 S. Ct. at 2552 & n. 3; *Adickes*, 398 U.S. at 159-61. While the non-moving party must show more than a "metaphysical doubt" as to material facts, *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 106 S. Ct. 1348, 1356 (1986), all inferences must be drawn in favor of the

nonmoving party. *Id.* at 1356-57. However, the Supreme Court has stated that "antitrust law limits the range of permissible inferences from ambiguous evidence in a § 1 case." *Id.* at 1357.

Specifically, "conduct as consistent with permissible conduct as with [an] illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy." *Id.*; *see Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752, 764 (1984). There must be some evidence that "tends to exclude the possibility that the [defendants] were acting independently." *Monsanto*, 465 U.S. at 764. Thus, evidence of parallel conduct alone cannot suffice to prove an antitrust conspiracy. A plaintiff "should present direct or circumstantial evidence that reasonably tends to prove that the [defendants] 'had a conscious commitment to a common scheme designed to achieve an unlawful objective.'" *Id.* (quoting *Edward J. Sweeney & Sons v. Texaco, Inc.*, 637 F.2d) 105, 111 (3d Cir. 1980), *cert. denied*, 451 U.S. 911 (1981)); *see also H.L. Moore Drug Exchange v. Eli Lilly & Co.*, 662 F.2d 935, 941 (2d Cir. 1981), *cert. denied*, 459 U.S. 880 (1982). As stated by this court, "[a]t a minimum, . . . 'the circumstances [must be] such as to warrant a jury in finding that the conspirators had a unity of purpose or a common design and understanding, or a meeting of minds in an unlawful arrangement.'" *International Distribution Centers, Inc. v. Walsh Trucking Co.*, 812 F.2d 786, 793 (2d Cir. 1987) (quoting *Michelman v. Clark-Schwebel Fiber Glass Corp.*, 534 F.2d 1036, 1043 (2d Cir.), *cert. denied*, 429 U.S. 885 (1976)).

We must note however that while summary judgment is a valuable means for avoiding unnecessary trials, and recent Supreme Court as well as Second Circuit cases have tended to encourage its use in complex cases such as this one, *see, e.g. Celotex Corp.*, 106 S. Ct. at 2555; *Anderson v. Liberty Lobby, Inc.*, 106 S. Ct. 2505 (1986); *Matsushita, supra*; *Knight v. U.S. Fire Ins. Co.*, 804 F.2d 9, 12 (2d Cir. 1986), *cert. denied*, 107 S. Ct. 1570 (1987); *Eastway Construction Corp. v. City of New York*, 762 F.2d 243, 250-51 (2d Cir. 1985), it should not be regarded as a substitute for trial.

Thus, while the Supreme Court has indicated that trial courts should draw only reasonable inferences in favor of the nonmoving party viewing the evidence as a whole, *see Matsushita*, 106 S. Ct. at 1357; *see also International Distribution Centers*, 812 F.2d at 793-94, and while some assessing of the evidence is necessary in order to determine rationally what inferences are reasonable and therefore permissible, it is evident that the question of what weight should be assigned to competing permissible inferences remains within the province of the fact-finder at a trial.

In *Matsushita* the plaintiffs had alleged that various Japanese television manufacturers were engaged in a predatory pricing scheme, financed by the charging of higher than competitive prices in Japan, designed to put American companies out of business. In that case, the Supreme Court stated that summary judgment dismissing the action was appropriate since predatory pricing schemes are inherently unlikely and since there was no sign of the alleged goal of such a scheme ever coming within reach after many years of its alleged operation. Thus, since the scheme was not "plausible," the Court stated that the jury should not be permitted to infer the existence of a conspiracy from evidence of higher than competitive prices in Japan since to do so could deter pro-competitive conduct, i.e., the setting of low prices in the United States. *Id.* at 1360; *see also Monsanto*, 465 U.S. at 762-64. If the scheme alleged is implausible, a conspiracy must be proved by strong direct or strong circumstantial evidence, and the implausibility of a scheme will reduce the range of inferences that may permissibly be drawn from ambiguous evidence. *See Matsushita*, 106 S. Ct. at 1360-62.

It is worth noting that the conspiracy alleged herein seems plausible, as evidenced by the apparent ability of some defendants to sell oil to Apex at prices significantly over market. Our task herein is to discern whether on the evidence presented it could reasonably be concluded that the higher prices came about as a result of a conspiracy, rather than through independent action of the defendants.

We also think it worth noting that in the *Matsushita* and *Monsanto* cases, the types of conspiracies alleged were more susceptible of direct proof since they concerned long-term complex relationships among competitors. *See* Posner, *Oligopoly and the Antitrust Laws: A Suggested Approach*, 21 Stan. L. Rev. 1562, 1569-75 (1969) (discussing difficulty of maintaining cartel of many firms and probable need for explicit agreement); *see also Gainesville Utilities Department v. Florida Power & Light Co.*, 573 F.2d 292, 303 (5th Cir.), *cert. denied*, 439 U.S. 966 (1978); F. Sherer, Industrial Market Structure and Economic Performance 199-200 (2d ed. 1980). In a case where the alleged scheme is short-term and relatively simple in operation, we must as a practical matter accept that the best proof available most often will only tend to show the existence of an informal, perhaps even tacit, rather than explicit, agreement. Therefore, we carefully examine the conduct and communications of the defendants in order to determine whether it evidences an agreement. *See Gainesville Utilities Department, supra* (citing Posner, *supra*, at 1562).

1. *Parallel Conduct*

Much of the evidence in this case concerns the alleged parallel conduct of the defendants. Parallel conduct can be probative evidence bearing on the issue of whether there is an antitrust conspiracy. However, parallel conduct alone will not suffice as evidence of such a conspiracy, even if the defendants "knew the other defendant companies were doing likewise." *Modern Home Institute, Inc. v. Hartford Accident & Indemnity Co.*, 513 F.2d 102, 110 (2d Cir. 1975). More must be shown.

Since mere parallel behavior can be consistent with independent conduct, courts have held that a plaintiff must show the existence of additional circumstances, often referred to as "plus" factors, which, when viewed in conjunction with the parallel acts, can serve to allow a factfinder to infer a conspiracy. *See id.; In re Plywood Antitrust Litigation*, 655 F.2d 627, 633-37 (5th Cir. 1981), *cert. dismissed*, 462 U.S. 1125 (1983). Such circumstances might include a common

motive to conspire or a high level of interfirm communications. *See, e.g., id.* at 633 (interfirm communications); *Ambook Enterprises v. Time Inc.*, 612 F.2d 604, 616 (2d Cir. 1979) (common motive to conspire), *cert. dismissed*, 448 U.S. 914 (1980). *See generally* P. Areeda, Antitrust Analysis 371-82 (3d ed. 1981). However, such plus factors may not necessarily lead to an inference of conspiracy. For example, such factors in a particular case could lead to an equally plausible inference of mere interdependent behavior, i.e., actions taken by market actors who are aware of and anticipate similar actions taken by competitors, but which fall short of a tacit agreement. *See id.* at 374-75. In such a case, a court might find it difficult to hold that the parallel acts "tend to exclude the possibility" of independent action.

As discussed below, see Parts IV.A.2 to IV.A.5 *infra*, while Apex points to evidence indicating that the long defendants may have been motivated by a desire to make inordinate profits, or to "get" Apex, this evidence of motivation creates an equally valid inference of independent action. Apex also points to evidence of a number of communications among the defendants. However, aside from the particular communications discussed below, see Part IV.A.2 *infra*, for the reasons stated by the district court, we believe that inferring a conspiracy from the existence of these communications would amount to speculation under the circumstances herein. *See* 641 F. Supp. at 1266-69. Accordingly, we believe that in this case Apex must show more.

Apex presents evidence which it believes shows that the parallel acts were "against the apparent individual economic self-interest of the alleged conspirators." *Modern Home Institute*, 513 F.2d at 111. Such a showing, if successful, might tend to exclude the possibility of independent parallel behavior. *See Bogosian v. Gulf Oil Corp.*, 561 F.2d 434, 446 (3d Cir. 1977), *cert. denied*, 434 U.S. 1086 (1978); *see also Matsushita, supra. See generally* 6 P. Areeda, Antitrust Law ¶¶ 1415, 1434, at 84-93, 213-21 (1986).

Apex argues that it made no economic sense for defendants individually to nominate early. However, the

most we can say in support of this position is that the evidence concerning the rationality of nominating early is ambiguous. For example, it is not really controverted that the price of oil was falling in early February 1982. The defendants suggest that this provided them with a good reason to take delivery early; the oil would be more valuable earlier in the month than later. Apex counters that this makes sense only if there was an immediate market for the oil since it costs money to store oil, since the money used to buy the oil early instead could be invested, and since the defendants allegedly already had inventories of oil on hand. However, these costs which might be incurred as a consequence of early delivery were very likely small in comparison with the potential decrease in value of the oil by the end of the month. Apex provides no probative evidence tending to show that defendants would have experienced difficulty in selling the oil after delivery or even that any defendant believed that late delivery would be harmful. Indeed, it was an officer of Apex who testified that in a falling market early delivery was indicated. While Apex presented the testimony of an expert who asserted that the defendants did not need the oil, the expert did not state that taking the oil early would be to the defendants' disadvantage. Since the evidence as to the rationality of nominating early is ambiguous, it appears that we do not have a case where a factfinder could be allowed to infer from the parallel conduct the existence of a conspiracy in the absence of additional evidence. *See id.* ¶ 1415b, at 86-87 (question is whether no rational person would engage in the alleged parallel behavior individually) (discussing *Modern Home Institute, supra*).

This does not mean that evidence of the long defendants' parallel conduct becomes irrelevant, however. A court deciding whether to grant summary judgment should not view each piece of evidence in a vacuum. Seemingly innocent or ambiguous behavior can give rise to a reasonable inference of conspiracy in light of the background against which the behavior takes place. Evidence can take on added meaning

when viewed in context with all the circumstances surrounding a dispute. Thus, while we must carefully determine what inferences reasonably may be drawn from each piece of evidence, we must make this determination in light of all of the evidence proffered by Apex.

2. *Communications Among the Defendants.*

Perhaps the strongest evidence of a conspiracy offered by Apex is contained in a notebook kept by Dennis Denihan of Northeast memorializing a telephone conversation on February 3 between Fred Slifka, an officer of Global, and Don Oliver at Northeast. The entry in the notebook read:

DAO

Re Merc Nominations

(1) All nominations in writing

(2) If not accepted, NPC [Northeast] to demand $100/contract/day penalty for 5 days

At end of five days window NPA to demand 10 pct penalty + oil plus go to court

(3) NPC to go to newspaper and expose exchange

(4) All loadings must be GATX

[Portion obliterated].

Under the circumstances herein, we believe a reasonable inference could be drawn that this notebook entry evidences an agreement between Slifka of Global and Oliver of Northeast to take the actions set forth in it. The district court suggested that since Apex itself picked GATX as the place of delivery, "it is more likely" that the conversation was a natural one between traders faced with the possibility of an Apex default on deliveries; that it was merely a discussion of shared concerns. *See* 641 F. Supp. at 1267. In other words, since those in the market were aware that Apex might well default, it was reasonable for competitors to discuss this possibility and also possible responses to be taken in order to ensure delivery of the oil.

However, while Apex itself initially chose GATX as the delivery location, there was some evidence indicating that Apex has not in the past been held to its initial selection of a delivery site. Moreover, it seems that if these two parties truly were concerned primarily with early delivery of the oil, a better way to ensure delivery might have been to show some flexibility as to the mode and place of delivery. Instead, the notebook entry seems to suggest that Northeast and Global may have agreed to insist on delivery of the oil at GATX. The long defendants cite evidence suggesting they feared loss of priority if they showed flexibility. However, this merely represents evidence disputing the inference which can be drawn from the notebook entry.

Moreover, the district court seems to have accepted the long defendants' assertion that since the price of No. 2 oil was falling at the time the nominations were made, no issue of fact could exist as to the motivation behind the early nominations. As this argument runs, it was sensible to accept the oil early so that a higher price could be charged on resale. This would tend to show that the notebook entries merely evidence an innocent conversation about how to achieve that end.

We cannot agree with this characterization of the evidence. First, assuming prices were falling, it was not inevitable that early nomination would be advantageous. For example, it would not have made sense to incur storage costs if fairly rapid resale was not feasible. A table compiled by the long defendants indicates that for *all* long positions in February 1982 No. 2 oil contracts, defendant and nondefendant, only about 30% of all nominations specified the first two days of the delivery period. Our calculations, based upon apparently undisputed compilations, submitted by Apex, of the number of nominations for each day made by each long defendant, indicate that over 60% of the long defendants' nominations were for the first two days (over 75% for the first three days); and approximately 65% of Global's nominations were for the first two days (100% in the first three days). While only about 10% of Northeast's nominations were for the first two days, over 55% were for

the first three days. The non-defendant longs nominated only 15% of their contracts for delivery for the first two days (19% in the first three days). In fact, it appears that the non-defendant longs nominated at most 23% of their Apex contracts for the first three days. It therefore seems clear that not all holders of long positions in oil contracts in a climate of falling prices saw fit to take delivery early, even with respect to those contracts to be delivered by Apex. Indeed, some evidence indicates that in the two months prior to February 1982, No. 2 oil prices may have been dropping, albeit not as rapidly. In those months, very few contracts were nominated early by holders of long positions.

We see no conflict between our view here that evidence of falling prices does not necessarily indicate that early delivery was in the interest of every holder of a long position, and our discussion above in which we stated that demanding early delivery was not automatically suspect. We believe that the demand of early delivery, by itself, creates no dominant inference.

However, in light of the incriminating nature of the notes regarding the telephone conversation, since we must draw reasonable inferences in favor of Apex, we conclude that the finder of fact should decide whether the denial of conspiracy by the defendants should be accepted. We do not reverse as to Global and Northeast since the claims against them have been settled. See note 1, *supra*. However, this discussion is relevant to interpreting additional communications among certain defendants which are discussed below.

We next consider several entries made in the notebook of William Berberich of Belcher on February 1, 1982, prior to the nominations by the long defendants. In that notebook, the name of Don Oliver, a trader at Northeast, appears. An arrow is drawn from the name to the notation, "*Losses.*" Under these notations there are additional notations that appear to relate to prices of No. 2 oil. Then there appears the following: "Demand *delivery*" (emphasis in original), "Look for Default" and "Merc—EFP." Several pages later, in another notation for February 1, the notebook reads, "Sat.

demand 12:01 Sat. [February 6] AM"; and in notations for February 2 appear the words, "promote crunch" and "press for default."

Apex asks us to infer from this that Berberich spoke to Oliver on February 1 and agreed to "demand *delivery*" and thereby "press for default" on the part of Apex. Apex offers no other evidence indicating that the conversation ever took place. Looking at this evidence alone, we agree with the defendants and the district court that inferring that a conversation took place would amount to speculation. Proof of Belcher acting independently in an attempt to create a short squeeze would not show a violation of the Sherman Act as alleged in the amended complaint.

Apex states that the suggested inference is a proper one because Belcher held a long position that was relatively small in comparison to the size of Apex. It is posited that Belcher alone could not have hoped to create a "crunch" and that therefore Belcher must have conspired to create the "crunch."

This reasoning ignores the undisputed evidence that Belcher was aware that Apex had relatively small amounts of No. 2 oil at GATX. On February 1, Apex actually had a deficit balance of oil at GATX. It also was widely known that Apex had a huge short position. Thus, it would not be unreasonable for officials at Belcher to assume that other holders of long positions might nominate some contracts early. One might also note that the 315 contracts held by Belcher amounts to 12,600,000 gallons, not an insignificant amount of oil.

At oral argument, counsel for Apex stated it could have made delivery on all of its obligations were it not for the insistence of the use of GATX. Accordingly, we are asked by Apex to conclude that Belcher could not have reasonably expected to "squeeze" Apex with only 315 contracts. First, even if we assume this were so, it says nothing of the knowledge or beliefs of Belcher officials as to the matter. Apex in its brief cites a passage from a deposition of Paul Novelly, a principal of Apex. However, in that deposition Novelly

merely stated that Apex had enough oil in its system "to delivery against the February contract[s]" "for the month." He did not testify that Apex could complete delivery the first three days of the delivery period. Thus, even if we were to assume that Belcher knew or believed that Apex was capable of delivering the oil over the course of the month, it could have harbored a reasonable expectation that it could "squeeze" Apex by nominating its 315 contracts for the first minute of the delivery period. We therefore cannot draw an inference of conspiracy from this notebook entry alone.

However, Apex also points to another conversation, between Slifka of Global and Berberich of Belcher, which Apex argues supports an inference that Belcher took part in a conspiracy. On February 3, Slifka spoke to Berberich. Berberich admitted that the conversation took place, but stated that it was limited to whether Slifka thought there would be a default and to the fact that Warren held a long position. In his notebook for that day, Berberich entered Slifka's name and telephone number, followed by, "1) G.E. Warren .150. 2) Sent Wires and Want Immediate Answer. 3) Threatened WS [illegible]." Two pages later in the notebook, on the same date, an entry reads:

—Penalty to start Fri.____

—10% after 5 days____

—oil at 5 days____

—Bring suit against exchange

—Restraining order to prevent any further trades on Merc.

Apex points out that above entries in Berberich's notebook closely resemble the entries in Denihan's notes, discussed above, regarding a conversation between Slifka (Global) and Oliver (Northeast) on the same day. Apex also points out that " 'once a conspiracy is shown, only slight evidence is needed to link another defendant with it.' " *United States v. Wilkinson*, 754 F.2d 1427, 1436 (2d Cir.) (Mansfield, J.) (quoting *United States v. Marrapese*, 486 F.2d

918, 921 (2d Cir. 1973), *cert. denied*, 415 U.S. 994 (1974)), *cert. denied* , 472 U.S. 1019 (1985).

In our view, the similarity between the notes seems striking. If a finder of fact were to infer a conspiracy between Global and Northeast, a possibility we have concluded would be reasonable in light of Denihan's notebook entries, *see supra*, it could reasonably conclude in light of Berberich's notebook entries regarding the Slifka conversation that Belcher also participated, especially if we view the Slifka conversation in light of Berberich's notations made two days earlier (e.g., "promote crunch" and "press for default"). The long defendants point out that the conversation between Berberich and Slifka took place after Belcher had made its nominations, and argue that the entries merely refer to a discussion of whether there was going to be default. However, the notes could more easily be interpreted as outlining the method of continuing the pressure that already had been placed on Apex. Thus, it reasonably could be inferred that the conversation consisted of more than mere speculation concerning Apex's ability to deliver. Accordingly, in light of all of the circumstances, including communications among the defendants and their parallel conduct, we must conclude that sufficient evidence has been produced from which a fact-finder could infer that Belcher, Global, and Northeast " 'had a unity of purpose or a common design and understanding, or a meeting of the minds in an unlawful arrangement.' " *International Distribution Centers*, 812 F.2d at 793 (quoting *Michelman*, 534 F.2d at 1043). We therefore reverse the dismissal of the antitrust claims as to Belcher.

Apex points to evidence of a series of additional conversations said to have occurred among the long defendants. Bearing in mind that evidence of the mere exchange of information by competitors cannot establish a conspiracy, *see Kreuzer v. American Academy of Periodontology*, 735 F.2d 1479, 1487 (D.C. Cir. 1984), we have carefully considered the arguments of Apex with respect to these conversations. For essentially the reasons stated by the district court, *see* 641 F. Supp. at 1266-69, we conclude that inferring the

existence of a conspiracy from the remaining conversations would amount to a mere speculation.

3. *Apex's Other Evidence.*

Apex presents a mass of other material that Apex characterizes as evidence of a conspiracy. We have carefully reviewed this evidence and, while we reverse and remand as to the antitrust claims against Belcher for the reasons stated above, and remain aware that " 'once a conspiracy is shown, only slight evidence is needed to link another defendant with it,' " *Wilkinson, supra*, since we do not find such a link, we conclude that affirmance of the grants of summary judgment is appropriate as to the remaining defendants.

a. The Activities of Sal DiMauro

Apex devotes much of its argument to discussing a number of activities engaged in by Sal DiMauro of Triad Petroleum, Inc. and TIC Commodities, Inc. We can find no permissible inference of conspiracy which can be drawn from any of this evidence.

Apex first points to an offer on February 1 by Sal DiMauro on behalf of Stinnes to sell Apex 300,000 barrels of oil for approximately 87¢ per gallon. This offer was withdrawn ten minutes later after Joseph DiMauro, also of Triad and TIC, spoke to the president of Stinnes. On February 2, Sal DiMauro offered Apex 300,000 barrels from Stinnes at 97 cents. And on February 3 Joseph DiMauro offered Apex 1.5 million barrels at 93.5 cents. Apex wishes us to infer a conspiracy from this. However, Apex offers no evidence tending to show that this sequence was part of any agreement beyond one between Stinnes and its broker, DiMauro. Moreover, the fact that Stinnes used its broker to make the offers does not amount to an illegal conspiracy. A more likely inference from this evidence is that once the market became aware of Apex's delivery obligations, Stinnes and others, as rational sellers, raised the price of oil in order to take advantage of Apex's plight.

Apex also argues that Sal DiMauro invited one Jerry Schultz, a trader at Tipco Products, Inc. ("Tipco"), not a

defendant, to participate in a short squeeze. Apex finds support for this proposition in the deposition of Schultz. However, a fair reading of the Schultz deposition leads to no such conclusion. Schultz had heard rumors of an impending short squeeze and discussed this with DiMauro. DiMauro asked Schultz "if [Tipco was] going to take delivery early." Schultz replied that Tipco had not yet decided and expressed concern about a lack of storage space. DiMauro suggested that delivery could be worked out. Schultz also asked how to go about nominating early. In response, DiMauro had a representative of TIC explain the nomination process to Schultz. Still unsure of the process, Schultz requested a telex explaining the necessary steps. TIC instead sent a telex to ContiCommodity Inc., Tipco's clearing member at the Exchange, which stated that Tipco planned to take delivery of all of its contracts on February 6. It also stated the "final delivery instructions [would] be communicated no later than February 5, 1982." Schultz testified that Tipco never authorized the sending of this telex.

One possible explanation for this activity is that DiMauro was soliciting Tipco to join a conspiracy. The problem with this approach is that it assumes that there was a conspiracy of which DiMauro was a member. Apex suggests that Schultz testified that he took the call to be an invitation to participate in short squeeze along with certain other defendants. However, nothing in the transcript suggests that DiMauro was shown to be part of a conspiracy. Nor does it suggest with which long defendants DiMauro is supposed to have been conspiring. So, even if we assume that DiMauro had invited Tipco to take part in a squeeze, there is no indication that he did so pursuant to an agreement with any particular long defendants. We are therefore unable to conclude that the Schultz deposition "tends to exclude" the possibility that DiMauro was simply trying to solicit business for his brokerage firm. We conclude that this evidence does not give rise to any permissible inference of a conspiracy under the circumstances herein.

Next, Apex points to a conversation between Joseph DiMauro and Slifka of Global on February 4. True, the

conversation was followed by the submission by TIC of a nomination on behalf of Stinnes of 300 contracts by inventory transfer at GATX on February 6. However, DiMauro was the broker for a number of the defendants, and its is a normal function for a broker to make transactions on behalf of a client. Further, given that there is no evidence of what was said during the conversation, we cannot conclude, in light of all of the circumstances, that a fact-finder should be allowed to infer that the conversation between DiMauro and Slifka concerned an agreement to squeeze Apex.

b. Statements of Certain Market Actors

Apex offers evidence of statements by certain persons that it claims suggest evidence of a conspiracy. This evidence adds little to what we already have discussed. The district court found that most of this evidence consists of inadmissible hearsay and that in any event none of the evidence tended to prove the existence of a conspiracy. We need not reach the hearsay question since the proffered evidence does not give rise to an inference of conspiracy.

For example, Apex argues that Tony Densieski, a trader for Texas Energy (not a defendant) informed the Vice President of the Exchange that certain longs have invited Densieski to take advantage of Apex's position. However, Densieski never specified which longs had made this offer. We clearly cannot infer the participation on the part of any defendant based on such a generalized accusation.

The testimony of Jay Bernstein, an employee of Northville Carribean, is similarly unhelpful. Bernstein merely testified as to his understanding that there was a conspiracy among "other longs." These longs were unspecified, and Bernstein testified that he had no personal knowledge of any actions taken by the longs.

Similarly, while Julian Raber allegedly told Patricia Lyons of Apex that he was aware of "a conspiracy to 'squeeze the shorts,' " and referred to the actions of the longs as a "sting," the testimony concerning these statements lacked any indication of what facts Raber based his opinion on or even

whether his opinion was based on anything at all other than rumor or speculation.

Upon examination of these and other alleged statements by market participants proffered by Apex in support of its conspiracy theory, we must conclude that taken either as a whole or individually, none of them creates an inference of a conspiracy among any additional named defendants.

c. Evidence of the Long Defendant's Motivation

Apex has presented evidence that it believes tends to show that the defendants were motivated by greed and by a strong dislike of Apex. Apex argues that such motivation tends to exclude the possibility of independent action because the long defendants had nothing to gain unless they acted in concert. As discussed above, however, it is not at all clear that one long defendant could not have forced Apex into some concessions. See Part IV.A.2, *supra*. Moreover, as each defendant became aware of the early nominations by the others, the advantages of inflexibility as to delivery date and location became evident. Since the early nominations became public knowledge, it became evident to anyone in the business that a profit could be made by forcing Apex to deliver. Thus, any motivation to "get" Apex gives rise to an inference of individual action which is equally as plausible as an inference of conspiracy. We therefore conclude that the long defendants' alleged motivation cannot succeed in establishing a conspiracy on the evidence herein.

4. *The Exchange Defendants.*

Little of the evidence discussed thus far relates to the Exchange defendants. The strongest evidence presented by Apex to show that the Exchange defendants participated in a conspiracy consists of evidence of a number of communications between the Exchange defendants and the long defendants. However, the content of these conversations, even as characterized by Apex, amounts to "jawboning" in an attempt to avert an impending default. We note that the Exchange also communicated with Apex as part of this effort. Moreover, Apex has offered no plausible motivation

for the Exchange defendants to have participated in the alleged scheme. We therefore affirm the grant of summary judgment as to the Exchange and Raber, its vice-chairman.

The district court held alternatively that in addition to failing to prove participation by the Exchange defendants in a conspiracy, Apex failed to show bad faith, which the district court believes is necessary in an antitrust claim asserted against a self-regulating market such as the Exchange when the claim relates to the duty of the Exchange to maintain a fair and orderly market. *See* 641 F. Supp. at 1282; *see also P.J. Taggares Co. v. New York Mercantile Exchange*, 476 F. Supp. 72, 78-79 (S.D.N.Y. 1979). Since we have concluded that Apex has failed to present evidence linking the Exchange defendants to a conspiracy, we need not reach the issue of whether bad faith is a necessary element of the antitrust claims against the Exchange.

5. *Summary of Antitrust Claims.*

Apex has presented massive additional materials that it claims amount to proof of a conspiracy when viewed in light of all the circumstances herein. Some of it tends to indicate that several of the defendants disliked Apex. Some of it seems to indicate that some of the long defendants may have used the circumstances as they existed in February 1982 to "get" Apex. However, aside from the evidence related to Global, Belcher and Northeast, discussed above, none of it gives rise to a permissible inference of a conspiracy among the defendants. Consequently, for the reasons discussed principally in parts IV.A.1 through IV.A.4., we affirm the dismissal of the antitrust claims as to all the other defendants.

B. Commodities Market Manipulation

The fifth claim in the amended complaint alleges that the defendants manipulated the commodities market in violation of the CEA, 7 U.S.C. § 13(b), which prohibits, *inter alia*, (1) any "attempt to manipulate the price of any commodity . . . for future delivery" and (2) delivery of "false or misleading or knowingly inaccurate reports concerning . . . market

information or conditions that affect or tend to affect the price of any commodity in interstate commerce."

The amended complaint alleges first that the long defendants, with the assistance of the other defendants, "attempted to and did manipulate the price of No. 2 Heating Oil" by "cornering" or "squeezing" the market for No. 2 oil. Amended Complaint ¶¶ 72-73. It also alleges that the long defendants, with the assistance of the other defendants, disseminated false reports in violation of the CEA. The district court dismissed both aspects of this claim. On appeal, Apex only presents arguments for reinstatement of the manipulation aspect of the claim. We therefore leave undisturbed the district court's dismissal of the false aspects of the claim.

The district court dismissed the manipulative scheme portion of the claim because while Apex alleged that the long defendants together engineered a squeeze, it failed to present evidence of a conspiracy. 641 F. Supp. at 1275. Having reversed this determination with respect to Belcher in the context of the antitrust claims, we also do so in context of the commodities manipulation claim.

Apex urges us to reverse as to all the long defendants on this claim despite the lack of evidence of a conspiracy, suggesting that each defendant alone could have manipulated the market. However, the amended complaint did not allege that *each* long defendant manipulated the market. Rather, it alleges that the "long defendants" did so. Since the complaint alleges collective action, this suit cannot be allowed to proceed as if it alleges individual action.

We do, however, reverse the dismissal of the manipulation allegation against Belcher. The dismissal of the fifth claim is in all other respects affirmed.

C. Failure to Regulate

Apex alleges as its seventh claim that the Exchange defendants failed to remedy the alleged market manipulation by the long defendants in violation of the CEA, 7 U.S.C. § § 7(d), 7a(8). The district court dismissed this claim

because it found that Apex failed to present evidence tending to show that the Exchange acted or failed to act as a result of self-interest or bad faith as interpreted in a number of this court's decisions. *See, e.g., Brawer v. Options Clearing Corp.*, 807 F.2d 297 (2d Cir. 1986); *Sam Wong & Son v. New York Mercantile Exchange*, 735 F.2d 653 (2d Cir. 1984). Apex on appeal argues that a number of statements by persons connected with the Exchange, most notably Julian Raber, could lead a reasonable juror to infer the existence of an improper motive in light of all the circumstances herein. Having carefully reviewed the allegations and the proffered evidence, we affirm the district court's dismissal of the claim of failure to regulate for the reasons stated in the district court opinion. 641 F. Supp. at 1276-81.

CONCLUSION

The only remaining claims are those alleging (1) common law fraud by the long defendants and (2) a violation of section 4(b) of the CEA by the long defendants. Apex does not request reversal of the dismissal of these claims in its brief and offers no arguments suggesting why reversal would be appropriate. We therefore do not consider these claims.

Accordingly, for the reasons stated above, we reverse the dismissal of the antitrust and commodities market manipulation claims as to Belcher. These claims are remanded for further proceedings consistent with this opinion. As noted in note 1, *supra*, this appeal has been dismissed as to Northeast. The judgment of the district court in all other respects is affirmed.

United States Court of Appeals

FOR THE

SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, in the City of New York on the 17th day of June, one thousand nine hundred and eighty-seven.

Present:

HON. LAWRENCE W. PIERCE,
HON. FRANK X. ALTIMARI,

Circuit Judges.

HON. JOHN E. SPRIZZO, *District Judge.*

APEX OIL COMPANY,

Plaintiff-Appellant,

v

JOSEPH DIMAURO, TRIAD PETROLEUM, INC., TIC COMMODITIES, INC., COASTAL CORPORATION, COASTAL STATES MARKETING, INC., BELCHER OIL COMPANY, THE BELCHER COMPANY OF NEW YORK, INC., BELCHER NEW ENGLAND, INC., BELCHER NEW JERSEY, INC., STINNES CORPORATION, STINNES INTEROIL, INC., EASTERN OF NEW JERSEY, INC., NORTHEAST PETROLEUM INDUSTRIES, INC., NORTHEAST PETROLEUM CORPORATION, GEORGE E. WARREN CORPORATION, NEW YORK MERCANTILE EXCHANGE AND JULIAN RABER,

Defendants-Appellees.

Docket No. 86-7898

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged and decreed that the order of said District Court be and it hereby is affirmed in part, reversed in part and remanded to the said district court for further proceedings in accordance with the opinion of this court.

ELAINE B. GOLDSMITH,
Clerk

By: EDWARD J. GUARDARO,
Deputy Clerk

United States Court of Appeals

FOR THE

SECOND CIRCUIT

At a stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse, in the City of New York, on the eleventh day of August one thousand nine hundred and eighty-seven.

APEX OIL COMPANY,

Plaintiff-Appellant,

v

JOSEPH DIMAURO, TRIAD PETROLEUM, INC., TIC COMMODITIES, INC., COASTAL CORPORATION, COASTAL STATES MARKETING, INC., BELCHER OIL COMPANY, THE BELCHER COMPANY OF NEW YORK, INC., BELCHER NEW ENGLAND, INC., BELCHER NEW JERSEY, INC., STINNES CORPORATION, STINNES INTEROIL, INC., EASTERN OF NEW JERSEY, INC., NORTHEAST PETROLEUM INDUSTRIES, INC., NORTHEAST PETROLEUM CORPORATION, GEORGE E. WARREN CORPORATION, NEW YORK MERCANTILE EXCHANGE AND JULIAN RABER,

Defendants-Appellees.

Docket No. 86-7898

A petition for rehearing having been filed herein by counsel for the defendants-appellees Coastal Corporation, Coastal States Marketing, Inc., Belcher Oil Company, The Belcher Company of New York, Inc., Belcher New England, Inc., and Belcher New Jersey, Inc., (collectively "Belcher"),

and the panel that heard the appeal having denied said petition for rehearing in an order filed on July 21, 1987,

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

ELAINE B. GOLDSMITH,
Clerk

United States Court of Appeals

SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse, in the City of New York, on the 21st day of July, one thousand nine hundred and eighty-seven.

APEX OIL COMPANY,

Plaintiff-Appellant,

v

JOSEPH DIMAURO, TRIAD PETROLEUM, INC., TIC COMMODITIES, INC., COASTAL CORPORATION, COASTAL STATES MARKETING, INC., BELCHER OIL COMPANY, THE BELCHER COMPANY OF NEW YORK, INC., BELCHER NEW ENGLAND, INC., BELCHER NEW JERSEY, INC., STINNES CORPORATION, STINNES INTEROIL, INC., EASTERN OF NEW JERSEY, INC., NORTHEAST PETROLEUM INDUSTRIES, INC., NORTHEAST PETROLEUM CORPORATION, GEORGE E. WARREN CORPORATION, NEW YORK MERCANTILE EXCHANGE AND JULIAN RABER,

Defendants-Appellees.

Docket No. 86-7898

A petition for rehearing having been filed herein by counsel for the appellees, COASTAL CORPORATION, COASTAL STATES MARKETING, INC., BELCHER OIL COMPANY, THE BELCHER COMPANY OF NEW

YORK, INC., BELCHER NEW ENGLAND, INC., and BELCHER NEW JERSEY INC.

Upon consideration by the panel that heard the appeal, it is

Ordered that said petition for rehearing is DENIED.

The Court notes that the manner of comparison of various early delivery nominations suggested by petitioner does not yield a significantly different result, and, when viewed in light of the other evidence, would still permit a jury to infer the existence of a conspiracy.

LAWRENCE W. PIERCE

FRANK X. ALTIMARI

Circuit Judges

JOHN E. SPRIZZO*

District Judge

* Hon. John E. Sprizzo, Judge, United States District Court for the Southern District of New York, sitting by designation.

N.B. This summary order will not be published in the Federal Reporter and should not be cited or otherwise relied upon in unrelated cases before this or any other court.

United States District Court

SOUTHERN DISTRICT OF NEW YORK

APEX OIL COMPANY,
Plaintiff,

v.

JOSEPH DIMAURO, *et al.*,
Defendants.

82 Civ. 1796 (JMW)
OPINION

WALKER, District Judge.

INTRODUCTION

Apex Oil Company brings this action against numerous defendants alleging antitrust conspiracy, Commodity Exchange Act violations, and fraud. The defendants are a number of companies and individuals, all of whom were participants in February 1982 in the futures market for No. 2 heating oil conducted through the New York Mercantile Exchange (the "Exchange").

Knowledge of the players in this case is critical. Plaintiff Apex Oil Company ("*Apex*") is a privately owned trader, refiner, and retailer of oil based in St. Louis. By uneasy convention, the defendants have been divided into two groups: The so-called "long defendants" include companies holding long positions in February 1982 heating oil contracts on the Exchange, their parent corporations, and brokers representing some of the companies. They are:

1. Joseph *DiMauro*, a broker in both the commodity futures market and the cash, or "wet," market for heating oil.

2. Triad Petroleum, Inc. ("*Triad*"), DiMauro's brokerage firm for wet market oil transactions.

3. TIC Commodities, Inc. ("*TIC*"), DiMauro's futures commission merchant firm, or brokerage firm for futures market oil transactions.

4. The Coastal Corporation, Coastal States Marketing, Inc., Belcher Oil Company, The Belcher Company of New York, Inc., Belcher New Jersey, Inc., and Belcher New England, Inc. (collectively "*Belcher*").

5. Stinnes Corporation and Stinnes Interoil, Inc. (collectively "*Stinnes*").

6. Eastern of New Jersey, Inc. ("*Eastern*").

7. Northeast Petroleum Corporation and Northeast Petroleum Industries, Inc. (collectively "*Northeast*").

8. George E. Warren Corporation ("*Warren*").

9. Former defendant Global Petroleum Corporation ("*Global*") will be referred to throughout.

The socalled "exchange defendants" are the *New York Mercantile Exchange* itself and *Julian Raber*, vice chairman of the Exchange.

While the facts and allegations require detailed exposition, all arise from the same occurrence. In February, 1982, Apex was a "short" in the futures market for No. 2 heating oil, that is, it had numerous contractual obligations to *sell* No. 2 oil through the Exchange. On the other side of the contractual equation were the "long" companies, those holding contracts to *buy* Apex's No. 2 oil. In the middle were the exchange defendants, through whose offices these obligations were created, regulated, and ultimately resolved.

The crux of the matter is that Apex did not have the oil in early February, 1982 when the defendant oil companies wanted it and accordingly claims it was obligated to purchase oil at artificially elevated prices to fulfill the contracts. After its unpleasant experience with this financial bind, Apex commenced this action, seeking damages on eight claims. The defendants have made six separate motions for summary judgment, which collectively address all claims by Apex.

THE COMMODITY FUTURES MARKET

A basic familiarity with the workings of the commodity futures market is an essential roadmap in this case. An excellent discussion on that score has been provided by the late Judge Friendly in *Leist v. Simplot*, 638 F.2d 283 (2d Cir. 1980), *aff'd sub nom. Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, 456 U.S. 353 (1982), upon which this Court cannot improve. A few highlights drawn from that discussion create a sufficient background here.

A commodity futures contract is an executory contract for the purchase and sale of a particular commodity—No. 2 heating oil in this case. Everything about the contract is standardized except the price of the subject commodity, which is fixed by open outcry on the floor of the exchange at the time of contract formation. A single futures contract for No. 2 heating oil constitutes 1,000 barrels of oil at 42 gallons per barrel.

The seller of a contract, called a "short," commits to deliver the commodity at a future date. The buyer, called a "long," binds himself on that date to accept delivery of the commodity and pay the price agreed upon at formation of the contract. Most contracts, however, do not result in actual delivery by a short to a long. In the common situation, where a short or a long does not wish delivery of the physical item to occur, he will "liquidate" his positions prior to the close of trading in a particular futures contract. In this case, where the subject commodity was heating oil slated for delivery in February 1982, trading in the contract closed on January 29, 1982.

The liquidation of a contract before the close of trading lies at the heart of "futures trading." Money is made or lost by a participant when he liquidates by forming an opposite contract for the same quantity of the commodity so that his obligations to deliver and receive offset each other. That is, a short who does not wish to deliver must enter into an equal number of contracts to buy the commodity, i.e., long contracts. A long who does not wish to accept delivery must buy

short positions. Gains or losses are measured by the difference between the prices of the offsetting contracts. If the market price of a future has increased prior to the close of trading, a long will realize a profit upon liquidation, while a short will lose. If the price has declined, the short will profit and the long will lose. It should be remembered that futures trading is a classic zero-sum game. Since every contract must have two sides, a long and a short, each gain by a market participant is accompanied by an equal loss by another participant.

In theory, there are two types of commodities customers: hedgers and speculators. The hedger is a trader with a parallel interest in the cash market for a commodity. He uses the futures market as a means of diminishing the risks faced in the cash market. While hedging is a complicated business, it may be generally grasped by imagining that the hedger is betting against his own cash market prospects by using the futures market. If he hopes to buy or sell a quantity of the cash commodity in the future, he will establish a position in the futures market which will be profitable if the price of the commodity moves in direction unfavorable to his cash market position. That way, losses in the cash market will be at least partially offset by gains in the futures market.

A speculator, on the other hand, is one who, in theory, has no real stake in the cash market and simply hopes to profit by trading in futures contracts as one might by investing in the stock market. By investing, the speculator assumes and seeks to profit from risks the hedger is specifically seeking to avoid.

The operation of a commodity futures market is characterized by several layers of professionals. A futures commission merchant, or broker, deals directly with the commodities customer. The broker communicates the customer's orders to a clearing member, an organization or individual with membership in the exchange. The broker may also be a clearing member, in which case the intermediate step is absent. As will become evident, the broker also

plays an active role should the customer wish to deliver or take delivery of the actual commodity.

The clearing member then executes the order to buy or sell by way of a floor broker who stands on the actual floor of the exchange and makes contracts by open outcry and hand signals. An entity called a "clearing house," of which each clearing member is a part, plays a crucial role in the entire process. The clearing house is the heart of the exchange and operates as a seller to all buyers and a buyer to sellers, thus facilitating the interchangibility of contracts and the liquidation of positions. The presence of this entity means an investor who wishes to liquidate or take delivery can always find a willing partner through the clearing house.

As discussed earlier, the most common outcome in the futures market is a liquidation of positions before the close of trading in a contract. Actual delivery of the commodity, however, does occur and that delivery process is critical to this case. In general, delivery is arranged when a short and a long each notify the exchange that they stand to give or take the possession of the subject commodity and not liquidate. When this occurs, the clearing house matches delivering shorts with accepting longs. As will be shown below, however, the matching details of place, method, and timing of delivery and any default or delinquency penalties are entirely the creature of the exchange's rules.

If the holder of a contract fails to liquidate by the close of trading, delivery under the exchange rules may yet be avoided by agreement between the parties to "exchange futures for product" or an EFP. In such a transaction, the delivery obligation under the exchange contract is superseded by a new contract providing for the short to deliver product on the wet market.

FACTUAL BACKGROUND

A detailed discussion of the facts will be included in the analysis of evidence at issue on each motion for summary judgment. A basic outline of the undisputed facts, however,

will serve as a useful background for the evidentiary maze that follows.

The last day of trading on the Exchange for the February 1982 contract in No. 2 heating oil was Friday, January 29. Under the Exchange rules, all contracts not intended for delivery or EFP resolution had to be liquidated by the close of trading on that day. By the end of January 29, Apex held a short—i.e., a seller's—unliquidated position on 4,378 contracts. Since each contract represents 1,000 barrels at 42 gallons per barrel, Apex was obligated on its contracts to deliver 183,876,000 gallons of heating oil in February 1982.

By the close of trading that day, the other side of the contract picture had also crystallized. While there were 4,906 total contracts open and designated for delivery, 1,945 of those were held on the long side by six oil companies alleged by Apex to be wrongdoers. On January 29, 1982, the six held the following number of long contracts:

Northeast	748
Warren	170
Belcher	315
Stinnes	300
Eastern	50
Global	362

On Monday, February 1, 1982, Goldman Sachs & Co. ("Goldman"), Apex's clearing member, submitted to the Exchange a "Delivery Notice for Petroleum Products Futures" for its short contracts. Under the rules of the Exchange, the short was obligated to select a delivery site in New York Harbor for its contracts upon submission of the Delivery Notice. Apex chose the GATX terminal in Carteret, New Jersey as the delivery site for 4,281 of its 4,378 contracts. The remaining 97 contracts were designated for delivery at the B.P. terminal at Tremley Point, New Jersey.

Also on Monday, February 1, pursuant to the rules, the clearing members for the longs submitted the required "Notice of Intention to Accept Petroleum Products Futures." As usual, the clearing house operated to match receiving longs with delivering shorts and, on February 2, the Exchange issued Allocation Notices matching up longs and shorts for delivery. Apex was assigned to deliver the full amount due to each of the six longs, except for fifteen of Warren's contracts.

Under the Exchange rules, which were incorporated into each contract, a long was obligated between the second and fifth business day of the delivery month to designate the date and method of delivery. Delivery was permitted by barge, tanker, truck, pipeline, intra-facility transfer, inter-facility transfer, or book transfer. Intra- and inter-facility transfers are oil pumpovers between tanks at one facility and more than one facility, respectively. Book transfer under the rules, commonly referred to as inventory transfer, is accomplished "by transfer of title to the buyer without physical movement of product." The parties also employ the term "book transfer" to mean an accounting method by which companies holding mutual delivery obligations extinguish those obligations on their books without any actual transfer of title or oil. The Court will adopt the parties' practice and use "book transfer" to mean the accounting mechanism for extinguishing obligations; "inventory transfer" will connote transfer of title without movement of oil.

The nomination for each contract had to be delivered to the clearing house by no later than 4:30 p.m. on the fifth business day of the delivery month. In this case, the deadline was Friday, February 5, 1982.

Under the rules of the Exchange, a long could designate for delivery any day between the beginning of the first calendar day *after* the fifth business day of the month and the calendar day *before* the last business day of the month. In this case, that meant the earliest day on which delivery could be demanded was Saturday, February 6. A short was obligated to deliver on the designated delivery day and as soon

as the designated barge or tanker reported readiness to load or as soon as the buyer reported the transfer facility or truck ready to accept the product.

Apex contends the long defendants, with the aid of broker DiMauro, agreed unlawfully during the first days of February to nominate their contracts for delivery in the first three delivery days of February, that is, February 6, 7, and 8. While there is a sharp dispute as to whether the defendant longs agreed to do so, there is no dispute that they in fact did nominate a large number of their contracts for delivery on the first few days. A chronology of those nominations is as follows:

February 2—Global nominated to take 51 of its contracts by barge on the morning of February 6 and 23 by barge on February 7.

—*Belcher* nominated to take all 315 of its contracts by barge at 12:01 a.m. on February 6.

—*Northeast* nominated to take 200 contracts by tanker at 8:00 a.m. on February 8, 1986.

—*Warren* nominated all 155 of its Apex-matched contracts for February 6.

February 3—Northeast nominated 75 contracts for barge receipt at 6:00 p.m. on February 6.

—*Northeast* nominated three separate barge loadings of 70 contracts each for 2:00 p.m. on February 6, noon on February 8, and noon on February 10.

—*Northeast* nominated 75 contracts for barge receipt at 6:00 p.m. on February 9.

—*Northeast* nominated to take 75 contracts by barge on February 10.

—*Northeast* nominated to take 75 contracts by barge at 6:00 p.m. on February 12.

—*Global* nominated to take 25 contracts by barge at 6:00 a.m. on February 6.

February 4—Stinnes nominated to take its 300 contracts by inventory transfer on February 6.

February 5—Eastern nominated to take all 50 of its contracts by inventory transfer on February 6.

—*Global*, altering nominations previously made but not listed above, nominated to take 111 contracts by book transfer on February 6.

—*Global* nominated an additional 25 contracts for inventory transfer on February 6.

—*Northeast* nominated to take 13 contracts by book transfer and 25 contracts by inventory transfer on February 10.

On Wednesday, February 3, Jeffrey Atkin, a member of the Exchange and a floor broker representing long interests, stated on the floor of the Exchange that Apex would be unable to make delivery. The Control Committee of the Exchange was convened that same day to hear Atkin's statements. The Control Committee is a body charged by the exchange by-laws with the "endeavor to correct any circumstances which interfere with or might interfere with the normal functioning of the market." It investigates market problems and attempts to resolve them by informal discussions, or "jawboning," with members of the Exchange. The minutes of the February 3 committee meeting reflect that Atkin said "he had learned from industry sources that Apex did not have oil to deliver to his customers." That same day, the Control Committee contacted Apex's clearing member, Goldman, and requested and received assurances that Apex had oil to deliver at GATX at the times requested by the longs.

On February 4, Goldman told the committee that Apex would make timely delivery using 750 contracts coming from Amoco and another 400 owned by or owed to Apex presently at GATX.

On February 5, however, Goldman informed the Control Committee that Apex's situation was different than previously represented. Apex did not have the necessary oil available at GATX. The 750 Amoco contracts would not be available for delivery to GATX on February 6, 7, or 8. In

fact, there was a *negligible* amount of oil available for delivery at GATX on February 6.

During February 4 and 5, the Control Committee, under the leadership of acting committee chairman and defendant Julian Raber, spoke to the clearing members representing holders of long positions in February. The clearing members were asked to urge their customers to agree to change delivery dates and sites. By the end of the day on February 5, all contracts slated for delivery on February 6 had been resolved with the exception of Stinnes' 300 contract nomination. In the late evening on February 5, in an effort to resolve the remaining contracts under this nomination, Raber met privately with DiMauro of TIC in the "Market Bar" restaurant at the World Trade Center. Both men testified that Raber urged DiMauro to negotiate with Apex to resolve the contracts and avert a crisis.

Eventually, all the delivery obligations were satisfied by EFP or delivery and Apex did not default. The resolution of this difficult situation, however, is the basis for Apex's claims. Apex claims that the long defendants conspired, (with the conspiratorial acquiescence of the Exchange and Raber), manipulated, and fraudulently insisted on delivery in the first few delivery days of February. In addition, it claims that Raber and the Exchange violated their statutory duties by failing to remedy the unlawful position in which Apex was placed. As a result, Apex alleges that it was forced to meet its delivery obligations by purchasing artificially high-priced oil on the cash market and from the longs themselves.

For example, while the February contract for No. 2 oil closed at a price of 89.7 cents per gallon, Apex alleges that it had to purchase 500,000 barrels of oil from Northeast at 96.25 cents per gallon and then transfer the product back to that company in satisfaction of its futures contracts with Northeast. Also on February 5, Apex claims it purchased 362,000 barrels from Global at 95 cents per gallon and transferred the oil back to Global to resolve its February contracts with that company. Additionally, Apex alleges it paid 97.5 cents per gallon for oil from Stinnes and Eastern

which was then delivered back to those companies in resolution of the February contracts.

In short, Apex believes that it was forced to buy into the "wet market" at artificially high prices as a result of the fraud, conspiracy, and manipulation by the various defendants and that the exchange defendants failed to remedy the unlawful situation by permitting deferred delivery. It is this unhappy series of events which gives rise to the eight claims asserted in the amended complaint to which we now turn.

THE ALLEGATIONS

(1) *Antitrust.* The first four claims for relief allege violations of the Sherman Act, 15 U.S.C. § 1 *et seq.* ("the Act").[1] The first three allege violations of Section 1 of the Act; the last involves Section 2. All four seek treble damages under the Act.

(a) Claim I alleges that the long defendants *and* the exchange defendants conspired to nominate for early delivery of the oil due the longs on their futures contracts.

(b) Claim II alleges that the long defendants conspired not to deal with Apex and refused to sell or make available No. 2 oil and as a result created an artificially high price for the oil in February 1982.

(c) Claim III alleges that the long defendants conspired to limit Apex's access to sources of No. 2 oil in February 1982 and as a result created an artificially high price for the oil.

(d) Claim IV alleges that the long defendants conspired to monopolize the market for deliverable No. 2 heating oil in early February 1982.

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[1] The Amended Complaint also alleges in the first four claims that defendants violated Section 340 of the New York General Business law. Apex has not argued that analysis of the conspiracy claims is different under this provision than under the Sherman Act. Accordingly, the discussion of the Sherman Act claims applies as well to the New York claims.

(2) *Commodities Manipulation.* Claim V alleges all defendants violated Sections 9(b) and 13(a) of the Commodity Exchange Act, 7 U.S.C. §§ 13(b), 13c(a), both by manipulating the price for No. 2 oil on the Exchange in February 1982 and by participating in the spreading of false reports about Apex. (These claims have been abandoned as to the exchange defendants. *See* discussion, *infra.*)

(3) *Fraud.*

(a) Claim VI alleges fraud by the long defendants under Section 4(b) of the Commodity Exchange Act.

(b) Claim VIII alleges common law fraud by the long defendants.

(4) *Regulatory Failures.* Claim VII alleges the exchange defendants violated the Commodity Exchange Act and rules promulgated by the Commodity Futures Trading Commission by failing to properly regulate the trading and delivery of No. 2 heating oil under exchange contracts in February 1982.

After over three years of discovery in this fact-intensive case, including more than 120 depositions and the production of mountains of documents, the defendants have made summary judgment motions which collectively address all claims. The motions have been extensively briefed in support and opposition and argued orally at great length.

ANTITRUST AND THE LONG DEFENDANTS: CLAIMS I-IV

(1) *Introduction*

Section 1 of the Sherman Act provides:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal . . .

26 Stat. 209, as amended, 15 U.S.C. § 1.

Section 2 of the Act provides:

> Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor . . .

26 Stat. 209, as amended, 15 U.S.C. § 2.

The defendants have narrowly addressed their summary judgment motion on the four antitrust claims to the question of conspiracy. Without conceding that a conspiracy would be *per se* unlawful in the context of this case, the defendants contend there is no material issue of fact concerning the allegations that:

> —all defendants conspired to demand delivery of the No. 2 oil in early February 1982;
>
> —the long defendants conspired to limit Apex's access to No. 2 oil;
>
> —the long defendants conspired to fix the price of No. 2 oil; and
>
> —the long defendants conspired to monopolize the market for No. 2 oil in early February 1982.

In short, the defendants argue there is no triable issue of fact as to whether *any* conspiracy existed with respect to the February 1982 heating oil futures contracts.

(2) *Summary Judgment Standard*

Under Fed. R. Civ. P. 56(c) the movant on a summary judgment motion bears the burden of demonstrating the absence of a genuine issue of material fact. *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 157 (1970). Once the movant has carried this burden, the non-moving party must come forward with "specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e). The non-movant must "do more than simply show that there is a metaphysical doubt as to the material facts." *Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corporation*, U.S. , 106 S. Ct. 1348 (1986). Where the record could not lead a

rational trier of fact to find for the non-movant, "no genuine issue for trial" exists. *First National Bank of Arizona v. Cities Service Co.*, 391 U.S. 253, 289 (1968).

The Supreme Court's recent decision in *Matsushita* explains the standard for summary judgment in the context of an antitrust conspiracy and details the method by which a district court should examine the voluminous record in search of a "genuine issue for trial." While some controversy may have existed prior to *Matsushita* concerning the proper standard for *horizontal* conspiracy cases such as this one, the first sentence of Justice Powell's opinion leaves no doubt as to that case's broad application: "This case requires that we again consider the standard district courts must apply when deciding whether to grant summary judgment in an antitrust conspiracy case." *Id.* at 1351.

The teaching of *Matsushita* and the Court's earlier decisions in *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752 (1984), and *Cities Service* is that summary judgment *is* available in the context of a large antitrust conspiracy case. In fact, the authorities indicate that the nature of such a case demands that the district court, in considering summary judgment, give searching scrutiny to the inferences available from the typically ambiguous mass of evidence.

In *Matsushita*, the district court had been faced with a summary judgment motion in an action that had been through years of discovery and involved twenty-one co-defendant corporations from the Japanese electronics industry. The trial court found that the admissible evidence did not raise a genuine issue of material fact as to the existence of the alleged conspiracy. 106 S. Ct. at 1352. The Third Circuit reversed the grant of summary judgment, holding that, based on inferences from the admissible evidence, "a reasonable factfinder could find a conspiracy . . ." *Id.* at 1353. In reaching that conclusion, however, the Third Circuit "apparently did not consider whether it was as plausible to conclude that petitioners' . . . behavior was independent and not conspiratorial." *Id.*

The Supreme Court held that the Third Circuit had applied the wrong standard. It concluded that the appeals court should have been more skeptical in its treatment of inferences drawn from the evidence of conspiracy in an antitrust case because "antitrust law limits the range of permissible inferences from ambiguous evidence. . ." The Court reiterated its earlier holding in *Monsanto* that "conduct as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy." *Id.* at 1357 (citing *Monsanto*, 465 U.S. at 764).

Building upon *Monsanto*, a case which involved an alleged *vertical* price-fixing conspiracy, the Court promulgated a general rule for *all* antitrust conspiracy cases:

> To survive a motion for summary judgment or for a directed verdict, a plaintiff seeking damages for a violation of § 1 must present evidence "that tends to exclude the possibility" that the alleged conspirators acted independently [citing *Monsanto*]. Respondents in this case, in other words, must show that the inference of conspiracy is reasonable in light of the competing inferences of independent action. . .

106 S. Ct. at 1357.

Matsushita involved allegations that the defendant Japanese electronics manufacturers and distributors had violated Section 1 of the Sherman Act by "dumping" products in the United States market and engaging in concerted "predatory pricing" in an effort to dominate the American market for electronics products with a view to subsequently raising prices. The petitioners in *Matsushita* argued that in light of the evidence's ambiguity, the absence of any rational motive to engage in predatory pricing, and the fact that the subsequently higher prices necessary to offset the predatory pricing losses had not occurred after twenty years, no trier of fact could reasonably conclude that the conspiracy existed.

The Supreme Court agreed that since predatory pricing was economically nonsensical, the admissible evidence did *not* tend to exclude the competing inference of independent

pro-competitive conduct. The Court reemphasized "that courts should not permit factfinders to infer conspiracies when such inferences are implausible, because the effect of such practices is often to deter pro-competitive conduct . . . [M]istaken inferences in cases such as this one are especially costly, because they chill the very conduct the antitrust laws are designed to protect." *Id.* at 1360 (citations omitted).

In this case, Apex has argued, in effect, that *Matsushita* cannot mean what it seems to say because the Court failed to overrule its earlier decision in *Poller v. Columbia Broadcasting System, Inc.*, 368 U.S. 464 (1962). In *Poller*, the Court considered the propriety of summary judgment in the context of an antitrust conspiracy case involving an alleged attempt by CBS and an affiliate to dominate the UHF television market in Milwaukee, Wisconsin. In a fact-specific decision, the Court concluded that summary judgment was inappropriate: "We look at the record on summary judgment in the light most favorable to Poller, the party opposing the motion, and conclude that it should not have been granted." *Id.* at 473.

In reversing the grant of summary judgment, the Court in *Poller* did employ language that appears contrary to the spirit of *Matsushita*:

> We believe that summary procedures should be used sparingly in complex antitrust litigation where motive and intent play leading roles, the proof is largely in the hands of the alleged conspirators, and hostile witnesses thicken the plot. It is only when the witnesses are present and subject to cross-examination that their credibility and the weight to be given their testimony can be appraised. Trial by affidavit is no substitute for trial by jury which so long has been the hallmark of "even handed justice."

368 U.S. at 473 (footnote omitted).

Plaintiff naturally relies heavily on this language to urge that summary judgment must be used sparingly in complex antitrust cases. However true that sentiment may have been in 1962, it is not true today. The Supreme Court's recent

opinions, particularly those in *Monsanto* and *Matsushita*, signal a marked change from the reticence to grant summary judgment of *Poller*, a change spurred, perhaps, by the onslaught of massive antitrust litigation over the last twenty years and the attendant stress on the administration of justice. It is also significant that *Matsushita*, in elucidating a standard which requires the district judge to carefully parse inferences before sending an antitrust case to a jury, does not mention *Poller*, a silence which speaks volumes about the Court's intentions.

The Supreme Court's recent decisions in *Anderson v. Liberty Lobby, Inc.*, 54 U.S.L.W. 4755 (June 25, 1986), and *Celotex Corporation v. Catrett*, 54 U.S.L.W. 4775 (June 25, 1986), offer further encouragement to a district court to utilize the summary judgment procedure. In *Anderson*, the Court decided that a district court, after assessing the proofs submitted by the non-movant plaintiff, should grant summary judgment in a libel case unless they met the "clear and convincing" standard required to prove malice. Citing *Cities Service* and *Adickes*, the Court made clear that a summary judgment motion is to be treated in the same manner as one for a directed verdict: The question is not whether there is *any* evidence supporting the non-movant but whether "there is sufficient evidence favoring the non-moving party for a jury to return a verdict for that party." *Id.* at 4758 (citation omitted). Thus, the Court reasoned, analysis in light of the appropriate evidentiary standard was required.

In *Celotex*, the Court held that even where the movant's proofs were meager and failed to negate the opponent's claims, summary judgment should still be granted where the evidence of the non-movant was deficient as to a necessary element of the claim as to which the non-movant bore the burden of proof. In that situation, summary judgment should be granted "since a complete failure of proof concerning an essential element of the non-moving party's case necessarily renders all other facts immaterial." *Id.* at 4777. The "showing" required for the summary judgment movant to meet its initial burden did not require actual evidence but merely a "pointing out to the district court that there is an

absence of evidence to support the non-moving party's case." *Id.* at 4778.

Both *Anderson* and *Celotex* reaffirm the principle that the summary judgment procedure should be used to dispose of cases that should not be tried. As the Court stated in *Celotex*,

> Summary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed "to secure the just speedy and inexpensive determination of every action."

Id. at 4778 (citations omitted).

In *Modern Home Institute, Inc. v. Hartford Accident and Indemnity Company*, 513 F.2d 102, 110 (2d Cir. 1975), Judge Mansfield wrote that summary judgment is particularly appropriate where an antitrust plaintiff has had ample opportunity "to obtain whatever proof of a conspiracy there may be in the hands of defendants." In that situation, "[i]f the most that can be hoped for is the discrediting of defendants' denials at trial, no question of material fact is presented." *Id.* (citations omitted).

More recently, the Seventh Circuit stressed the potentially important role of summary judgment in large antitrust cases:

> When a District Court has afforded the parties eight years of unlimited discovery, the parties have designated the evidence on which they will rely at trial, and the Court has had an opportunity to review the evidence and concludes that no reasonable jury could return a verdict for plaintiffs, judicial economy mandates that summary judgment be entered. A trial on such claims would serve only as a forum for impeachment and argument by counsel; not for the presentation of evidence.

Weit v. Continental Illinois National Bank & Trust Co., 641 F.2d 457, 464 (7th Cir. 1981) (citations omitted), *cert. denied*, 455 U.S. 988 (1982).

In *Matsushita*, the Supreme Court made it clear that in an antitrust conspiracy case ambiguous evidence is to be treated skeptically on a motion for summary judgment, since an inference of unlawful conduct which arises only from ambiguous evidence will be of no use to the plaintiff at trial. In *Monsanto*, the Court warned that a standard which permitted trial on the basis of such inferences presented "a considerable danger" that pro-competitive conduct would be discouraged. 465 U.S. at 763. The test enunciated in *Matsushita* also dictates that ambiguous evidence, because it is by definition incapable of a dominant inference, will not alone defeat a motion for summary judgment.

In this case, defendants' sworn denials are more than sufficient to shift the burden to plaintiff under Fed. R. Civ. P. 56(e). *Weit*, 641 F.2d at 461; *see Celotex*, 54 U.S.L.W. at 4777. Thus, to survive defendants' motion for summary judgment, Apex must establish that there is a genuine issue of material fact as to whether defendants entered into a conspiracy. To make such a showing, Apex must offer significant probative evidence which tends to exclude the possibility that the alleged conspirators acted independently. *Matsushita*, 106 S. Ct. at 1357; *Cities Service*, 391 U.S. at 285; *Weit*, 641 F.2d at 462.

(3) *Parallel Conduct*

It is a "familiar doctrine that the existence of a conspiracy rarely can be established by direct proof but usually is inferred from acts, declarations and conduct of the alleged members of the unlawful combination." *Hunt v. Mobil Oil Corp.*, 465 F. Supp. 195, 223 (S.D.N.Y. 1978) (citations omitted), *aff'd mem.* 610 F.2d 806 (2d Cir. 1979). And, as discussed, *Matsushita* makes it the duty of the court on summary judgment to carefully examine circumstantial evidence and its concomitant ambiguities.

Circumstantial evidence alone, however, can be sufficient to support a finding of an antitrust conspiracy. *Interstate Circuit, Inc. v. United States*, 306 U.S. 208 (1939). In fact, as in this case, parallel business behavior —"conscious parallelism"—is the type of circumstantial evidence often relied

upon to support an allegation of conspiracy. As will be seen, Apex devotes substantial effort to the construction of an inference of conspiracy from proof of parallel conduct plus a wide range of alleged circumstantial evidence. While the parties have disputed the extent to which Apex relies on parallelism to infer conspiracy, it is obvious that the method of proof is at the heart of Apex's attempt to survive this summary judgment motion.

In *Interstate Circuit*, plaintiff alleged that a group of motion pictures distributors had conspired to restrict later showings of newly distributed films in certain Texas cities, thus benefiting first-run theatres. There was no direct evidence in the case showing that the distributors had agreed with one another to impose the restrictions, but each distributor knew the others had considered the same proposal and knew the restrictions would work only if adhered to by all distributors. In addition, concerted action would create a likelihood of increased profits for each individual distributor which did not exist if less than all distributors imposed restrictions.

On those facts, the Supreme Court held that an inference of agreement to restrain competition could reasonably be drawn. In *Cities Service*, the Court explained that the inference was possible in a case like *Interstate Circuit* because the parallel behavior there was accompanied by an identical motive: each conspirator stood to gain greatly from a cartel. On the other hand, independent action would rationally lead to economic losses since others could not be counted on to act in the same manner.

The facts in *Cities Service* were markedly different and permitted no inference of conspiracy from circumstantial evidence of parallel action. In that case, plaintiff claimed that Cities Service Oil Co. ("Cities Service") was part of a conspiracy among oil companies to refuse to buy plaintiff's Iranian oil. The Court held that although Cities Service, like the other oil companies, had refused to deal, an inference of conspiracy did "not logically follow" because Cities Service could not possibly have benefited from a refusal to deal with

the plaintiff; it made no economic sense for Cities Service to join the boycott. 391 U.S. at 287.

Modern Home sheds further light on the use of parallel behavior in the antitrust context. There, the Second Circuit noted that "parallel behavior alone is not sufficient evidence of conspiracy" and the mere fact that all defendants acted in the same manner, even if each "knew the other defendant companies were doing like-wise, is not enough to defeat the motion for summary judgment." 513 F.2d at 110 (citations omitted). The court explained that where the parallel conduct demonstrated by plaintiff was "consistent with independent competitive decisions . . . [,] [a]dditional facts or circumstances are needed to show that the decisions were interdependent and thus raise the inference of a tacit agreement . . . " *Id.* On the other hand, "[a]ctions against the apparent individual economic self-interest of the alleged conspirators may raise an inference of interdependent action," as may actions which would make economic sense *only* if done in concert. *Id.* at 111.

(4) *The Evidence*

We now turn to the evidence offered by Apex to determine if it has met its burden of producing significant probative evidence of concerted behavior which tends to exclude any competing inference of independent action. In its opposition papers, Apex has attempted to divide its case for conspiracy into direct and circumstantial evidence. In this regard, Apex contends it has offered sufficient direct evidence of a conspiracy among the defendants to defeat a motion for summary judgment without recourse to inferences from circumstantial or ambiguous proof. As will be seen below, however, the distinction between direct and circumstantial evidence is a murky one, particularly in the context of an alleged antitrust conspiracy where confessions and smoking guns are few and far between. As one court has noted: "It does not strain credulity that solemnized covenants to conspire are difficult to come by in any price fixing case." *In re Plywood Antitrust Litigation*, 655 F.2d 627, 633 (5th Cir. 1981), *cert.*

dismissed sub nom. Weyerhaeuser v. Lyman Lamb, 462 U.S. 1125 (1983).

It is also apparent from the organization of Apex's memorandum in opposition that it intends to present an imposing overall picture of a conspiracy constructed from a myriad of evidentiary inferences. While any one piece might not reasonably infer conspiracy, Apex attempts to present a completed puzzle which will. The sheer volume and desultory organization of the facts presented makes dissection of Apex's evidence an unenviable task, but it is an effort mandated by *Matsushita*.

It must be remembered throughout this exercise that an assumption of conspiracy is *not* the starting point after which each event must be explained away by the defendants. Rather, it is Apex, now faced with unequivocal sworn denials, that must demonstrate that the evidence, construed in its favor, supplies an inference of conspiracy that is reasonable in light of any competing inference of independent conduct proffered by the defendants. In this regard, it is critical that Apex's often bewildering effort to treat the "longs" as a monolith be resisted. Evidence must be presented which tends to establish that *each* defendant made a conscious commitment to concerted action. Moreover, inadmissible hearsay may not be considered and the co conspirator exception to the hearsay rule may only be employed after Apex has offered evidence which independently tends to establish that the declarant under consideration is a member of the conspiracy.

(a) *"Direct" Evidence*

1. *Schultz Testimony.* Apex offers the testimony of Jerry Schultz, a commodities trader in 1982 with Tipco Products, Inc., as direct evidence of conspiracy. Tipco held a long position in February contracts and had been matched for delivery with Apex. Schultz testified at his deposition that on the morning of Tuesday, February 2, he received a phone call from Joe DiMauro's brother Sal, of defendant Triad. Affidavit of Richard J. Weiner ("W. aff.") 68—Schultz at 22-24, 26. Triad was a broker who represented parties to wet

market contracts. Apex characterizes Schultz's testimony as stating that Sal DiMauro invited him to participate in a "short squeeze" of Apex. Apex Memorandum in Opposition ("Apex mem.") at 52. Apex contends Schultz was asked by Sal DiMauro to nominate Tipco's contracts for early delivery and "came to understand the conspiring longs included Belcher, Northeast, Stinnes and Global." *Id.* at 54.

Schultz testified that he was concerned about nominating early in the delivery month because he had no storage. W. aff. 68—Schultz at 24-25. In response, Sal DiMauro stated that storage arrangements could be worked out. *Id.* When Schultz expressed uncertainty over the proper steps for nomination, Sal DiMauro had a representative of TIC, the commodities broker, call and explain the nomination process. *Id.* at 27. When Schultz continued to have questions, he asked for a telex explaining the necessary steps. *Id.* at 28. Instead, he received a copy of a telex addressed to Conticommodity Inc. ("Conti"), Tipco's clearing member at the exchange, stating that Tipco wished to take delivery of all its February contracts on February 6, the first possible delivery date. Schultz testified that he never authorized the sending of the telex to Conti. *Id.* at 28-30.

Apex argues that this testimony is direct evidence that Sal DiMauro, brother of defendant Joe DiMauro, and an employee of defendant Triad, was recruiting co-conspirators to nominate early and demand delivery from Apex. Despite Apex's effort, however, this testimony produces no direct evidence and, in fact, only serves to create extremely ambiguous circumstantial evidence of conspiracy.

Apex has mischaracterized Schultz's testimony. The full text of the Schultz deposition reveals that he was *never* asked to participate in a "short squeeze" and DiMauro *never* used those words in their conversation of February 2. Reply Affidavit of Neil P. Motenko ("M. aff.") 12—Schultz at 79. Schultz said he did not think DiMauro was asking Tipco to nominate on the first delivery day and no one tried to pressure him to nominate on a particular day. *Id.* at 71, 72; 61-62. Contrary to Apex's phraseology, Schultz *never* "came

to understand the conspiring longs included Belcher, Northeast, Stinnes and Global." He merely testified that " at some point" he "came to realize" that those companies were among those holding long positions matched with Apex. *Id.* at 20, 23-24. All this, of course, was market information.

Even if it may be concluded from Schultz's testimony that he knew a "short squeeze" was taking place, it is entirely unclear what he intended that term to mean. Schultz's use of the phrase is susceptible of two radically different meanings. It could import a conspiratorial effort to apply pressure on a short or it could mean a circumstance brought about by market forces upon a short's failure to secure adequate supply. Thus, even if Schultz's testimony is construed as Apex wishes, it does not support an inference of conspiracy which tends to exclude the inference of independent action; at best for Apex, it is ambiguous.

The remainder of the circumstantial evidence gleaned from Schultz's testimony by Apex is of little use. The offer of storage by DiMauro is probative of nothing; DiMauro was a broker for Tipco who attempted to facilitate transactions for his customers and stood to receive a fee for arranging storage. The telex sent to Conti on behalf of Tipco is ambiguous. It was a *preliminary* indication of a desire to nominate and expressly provided that "further delivery instructions" were intended. In light of the fact that Schultz had inquired as to the procedure for nomination, the telex at best presents competing inferences. Any inference of conspiracy drawn from it simply does not "tend to exclude" the competing inference that it was the work-product of an aggressive brokerage firm soliciting its client's business.

2. *Densieski Statements.* Apex offers as direct evidence the statements of Tony Densieski, an employee of Texas Energy, another long matched with Apex in February 1982. Densieski's statements are reported first by John Treat, Senior Vice-President of the Exchange, who described a telephone conversation with Densieski in February, during which Densieski allegedly reported that he had been recruited by unspecified "longs" to take advantage of Apex's

"difficult position." Neither Densieski nor Texas Energy are alleged to be co-conspirators, so Densieski's statements, as reported by Treat, are inadmissible hearsay. And even if this testimony were admissible, it is of minimal probative value. Considering the size of the open position on the Exchange in February contracts, the vague reference to "longs" is non-probative against the defendants.

Other statements by Densieski are reported through the testimony of Paul Beenen, an employee of the Exchange, who testified that he too spoke to Densieski in February 1982. Not only is this testimony also inadmissible hearsay, but it does no more than state that "people" were taking "advantage" of Apex because it was "subject to market pressures and did have to go to the cash market to get oil that they eventually didn't have in place . . . " W. aff. 2—Beenen at 117-118. This is merely evidence that Apex had difficulty meeting its obligations and that unspecified parties were doing unspecified things to take "advantage" of the situation.

It should be noted here, and remembered throughout the discussion of Apex's evidence, that there is nothing unlawful about "taking advantage" of Apex. The fact that a long, aware of Apex's shortage of deliverable oil, chose to stand by its nomination and extract concessions from Apex at most shows the long and Apex are players in an aggressive market. Such conduct may not be nice, but it does not tend to establish an actionable antitrust violation. The issue at the heart of this discussion is whether two or more defendants *together* decided to exercise their rights and by so doing take advantage of Apex. Without proof of concerted action, the parallel assertion of legal rights provides no reasonable inference of conspiracy. *Hunt v. Mobil Oil Corp.*, 465 F. Supp. 195, 229 (S.D.N.Y. 1978), *aff'd mem.* 610 F.2d 806 (2d Cir. 1979).

3. *Bernstein Statements.* Apex claims Jay Bernstein, an employee of Northville Caribbean, another long matched with Apex, presents direct evidence of the conspiracy. It says Bernstein knew "other longs were forcing Apex to deliver

early and were offering Apex a buy out at very high prices . . . . Northville Caribbean, however, elected not to participate in the conspiracy." Apex mem. at 59-60 (citations omitted).

This characterization of Bernstein's testimony is absurd. He never spoke of a "conspiracy." M. aff. 20—Bernstein at 21-22; 43-44; 96-97; 136-38. And even his actual testimony, while nonhearsay, is of dubious probative value because he referred only to "other longs" and said he had no personal knowledge of the longs' actions.

4. *Raber Statements.* The fourth piece of so-called direct evidence presented by Apex is provided by the reported statements of defendant Julian Raber, vice chairman of the Exchange, and an alleged co-conspirator. Patricia Lyons, an employee of Apex, recorded that Raber told her on February 11, 1982 that he was aware there had been "a conspiracy to 'squeeze the shorts.' " W. aff. 72—Lyons ex. 7; 73—Lyons at 91. Paul Novelly, President of Apex, also testified that Raber later referred to the events of the first week of February as a "sting." W. aff. 1—Novelly at 155.

These statements are inadmissible hearsay. Fed. R. Evid. 801(d) provides:

> A statement is not hearsay if—
>
> (2) The statement is offered against a party and is . . . (E) a statement by a coconspirator of a party during the course and in furtherance of the conspiracy.

At oral argument, Apex's counsel stated that it is Apex's contention that the conspiracy began on February 1, 1982 and ended no later than February 8, 1982. Transcript of Argument ("Tr.") at 103. Thus, these statements, even if construed in the manner urged by Apex, were made *after* the completion of any conspiracy and not "during the course of" a concerted effort. The statements also cannot be characterized as ones made "in furtherance" of the conspiratorial enterprise. It hardly furthers a conspiracy's purposes for a co-conspirator to implicate his fellows. Lyons also never said Raber used the word "conspiracy"; that was a helpful gloss

added by her. Moreover, the use of the term "sting" by Raber is as consistent with independent action as with a conspiracy. Finally, as discussed below, there is no independent evidence to establish that Raber was a member of the conspiracy and was therefore ever capable of making a "co-conspirator" statement.

5. *Karam Statements.* Apex's fifth piece of "direct" evidence consists of the statements of Fred Karam, president of Karam Petroleum Company. Edwin Wahl, an Apex employee, testified that he spoke to Karam on the third or fourth day of February and Karam told him that defendant George E. Warren Corporation was "trying to blank you," that is, trying to get Apex. W. aff. 44—Wahl at 196-97.

First, this testimony is nonprobative. Karam *actually* told Wahl that "he had heard some rumors" that Warren was out to get Apex; he never said someone from *Warren* declared that company's malicious intention. *Id.* Even a direct statement of Warren's animus towards Apex, however, would not be probative of a *conspiracy* to get Apex. As noted earlier, there is nothing illegal about aggressive, even nasty, competitive behavior standing alone. Second, even if Karam was reporting statements by Warren employees, the testimony of Wahl about Karam statements about Warren statements is double hearsay and inadmissible.

6. *Atkin Statement.* The final piece of evidence claimed to be direct by Apex is the statement of Jeffrey Atkin, the floor broker for several of the long defendants. Daniel Mancusi, head of the Exchange clearing house, testified that Atkin told the February 3 meeting of the Exchange's Control Committee that "one or two of his customers were out to get Apex." W. aff. 93—Mancusi at 145-46.

This statement, too, is inadmissible hearsay. Atkin is not an alleged co-conspirator. Even if the statement were admissible, it is of little probative value concerning the conduct of particular defendants. Mancusi's report of Atkin's statement does not specify what "customers" Atkin meant or what being "out to get" Apex entailed.

Finally, the fact that "one or two" customers sought to "get" Apex is neither probative nor surprising. There is no serious dispute in this case that Apex was not well-liked. The market had moved sharply against the longs since the purchase of their contracts. They had purchased the February contracts at prices ranging from $1.0375 to $.9020 per gallon and the closing price for February oil was $.897 per gallon. W. aff. 75—Commodities Statements. During the market's fall in late January they had been forced to expend substantial sums on margin payments. The longs believed that it was Apex's massive expansion of its short position during January which depressed the futures price for No. 2 oil, forcing them to incur margin costs and allowing Apex to reap large liquidated and unliquidated (i.e., paper) profits. In fact, it is the defendants' contention—and the subject of counterclaims—that Apex played a high-stakes game of expansion in short positions right up until the close of trading on January 29 in the hope that it could defer delivery over the month of February while the market price continued to drop, resulting in additional profits. *See* Tr. at 87-89. There is little doubt that a long might have harbored ill will toward Apex resulting in a desire to "get Apex." Nonetheless, such a desire, even if properly evidenced, would not necessitate an inference of conspiracy; it is as consistent with independent action.

(b) *Circumstantial Evidence*

1. *Late January Purchases.* Apex claims that purchases of long positions by the defendants in late January without economic justification are evidence of a conspiracy. Apex does not contend the conspiracy existed at that point, but merely that the unsound purchases are evidence of the later formed conspiracy. On January 27, Belcher purchased 80 contracts and Warren purchased 158. On January 28, Northeast bought 331 contracts.

Northeast: Apex asserts that the late January purchases support an inference of unlawful behavior by Northeast because prior to the establishment of these long positions, Northeast had severely cut back its scheduled receipt of oil in January and February from wet market suppliers.

Belcher: Apex also claims that Belcher bought these late January contracts at a time when it was declining to accept deliveries from its oil suppliers.

Warren: Apex argues that Warren's late purchases are suspicious because none of the Warren witnesses could remember why they increased their February long position at the end of January.

Without explicitly saying so, Apex apparently believes these are "parallel acts against interest" in January that support an inference of a conspiracy in early February. Putting aside the difficult question of how purchases made *before* the conspiracy are evidence of a common scheme, Apex's presentation of the evidence omits one critical fact that makes an inference of *independent* action from the late January purchases overwhelming: The oil could be purchased at a lower price through a futures contract on the Exchange than it could under existing wet market supply contracts. The witnesses and documents of both Northeast and Belcher establish that they could get cheaper No. 2 heating oil through a February long contract than from their wet market suppliers. M. aff. 2, 21—Oliver vol. 3 at 70-108; Kaneb at 50-74 (Northeast); M. aff. 23, 24, 3—Costikyan at 381-382; Kelly vol. 4 at 158-162; Berberich vol. 2 at 371-372 (Belcher). The witnesses from Warren simply could not recall what their rationale was at the time of purchase. This omission is probative of nothing, particularly in light of the reasons given by Northeast and Belcher for their late purchases.

2. *Prior Practice.* In support of a conspiratorial inference, Apex contends that the actions of the six longs in nominating for delivery in the first three delivery days of February and sticking to those nominations was contrary to prior practice in the industry. This deviation from normal practice, Apex implies, when combined with parallel conduct, supports a conspiratorial inference sufficient to survive this summary judgment motion.

Apex argues that while the Exchange rules permitted a nomination for delivery on the first day after the fifth business day of the month, "it was the custom in the industry for the long and short to mutually work out the time, method and place of delivery." Apex mem. at 16. Customarily, it contends, the parties would agree to resolve their contracts by EFP or book transfer, a solution which required no immediate physical product. Apex claims that despite being short on 2,048 contracts for December 1981 and 4,612 contracts for January 1982, it had no problem making delivery by mutual agreement. In fact, an Apex witness estimated that one-half to two-thirds of the deliveries made by Apex in prior months had been resolved by book transfer. W. aff. 29—Bishop at 276. Apex further argues that in contracts for delivery in December 1981 and January 1982 none of the long defendants concentrated their nominations early in the month and, in fact, spread them "reasonably throughout the month." Apex mem. at 25.

The long defendants do not dispute Apex's characterization of their behavior as to December 1981 and January 1982 contracts. Instead they contend that Apex has inaccurately stated the custom of the industry and ignored basic economic incentives that distinguished their behavior in other months from that in February.

The price at which a long purchased February heating oil in 1982 was fixed at the time of contract formation. Thus, by the time the delivery phase was reached at the close of trading on January 29, the longs had locked in a price for their oil. This situation is critical in light of two undisputed facts: the wet market price for No. 2 heating oil was *falling* in February 1982 and this was a predictable market response as the heating season drew to a close. The price of *March* futures, known in January and February, clearly signalled the resulting natural price drop.

To a long holding a right to receive oil at a fixed price, the falling market created a powerful incentive to receive the oil and resell it before the market price fell too far. Apex's own

expert has testified that in a falling market oil is most valuable to a trader at the beginning of the month, before its price slides further. M. aff.—31—F. Edwards at 758-61. Common sense dictates that if one must take the oil at some point in a month, it is most desirable when it is most valuable. Thus, in a *rising* market month, a long would naturally seek to defer receipt and avoid storage costs while watching the value of his oil rise. In a *falling* market, however, a long would take the oil and incur storage costs in the hope that these costs would be more than offset by the early sale of the oil before its price fell too far below the price paid for it through the futures contract. For example, Warren estimates that every day that receipt of its 155,000 barrels from Apex was deferred represented a decline in resale value of over $10,000, or $300,000 per month. In contrast, storage of the oil would only cost between $31,000 and $46,500 per month. Reply Memorandum of G. E. Warren Corp. ("Warren reply") at 28. The incentives speak for themselves.

This analysis highlights the fallacy of Apex's argument from prior behavior. It is undisputed that in the months of December 1981 and January 1982—peak heating months—the price of heating oil was *not* falling, but rising. Thus, the economic forces at work in February differed from those in prior months and make comparison inappropriate. On the other hand, although the March 1982 contracts were subject to slightly different delivery rules, the pattern of nominations there is instructive. In that month, 41% of the long contracts were nominated for the first two delivery days, compared with 29% for February. M. aff. 32—L. Edwards ex. 12. Even if one controls for the fact that the March rules provided for a five day delivery "window" and the ultimate resolution of the 41% nominated is unknown, March 1982 contract delivery nominations vary significantly from those in December 1981 and January 1982 and are more consistent with the February 1982 early nominations.

The long defendants have also offered two other substantial reasons for early nomination in February which Apex's proof does not put into issue. The defendants contend some

barge companies in New York Harbor were faced with a barge strike in 1982, which in early February created an incentive to seek early delivery. Reply Memorandum of Long Defendants at 13-14; Tr. at 41. Additionally, representatives of Northeast testified that they intended to move oil to their New England facilities from New York and were concerned about delays due to ice and weather conditions. M. aff. 6, 2—Denihan vol. 3 at 128, 185; Oliver at 137-138.

Apex's attempt to demonstrate that past practice and market custom required the longs to be flexible and to accommodate short desires to defer delivery is unconvincing. By Apex's own admission, February 1982 cannot be compared with February 1981 or 1983. Tr. at 101. There is, then, no benchmark to measure "past practice" or "market custom" in a market like that of February 1982. It is also probative that other non-defendant companies nominated large portions of their long positions for the first three delivery days of February 1982. W. aff. 49—Exchange Summary of Feb. Nominations. Thus, apart from offering the conclusory statements of several market participants that "flexibility" was the practice, Apex has not demonstrated that there existed any custom or practice from which the parallel nominations of the longs in February 1982 and their insistence on those nominations was a departure and thus capable of a plausible conspiratorial inference.

It should be noted at this point that Apex has sought to control the terms of debate by lumping the individual defendants together as a monolithic group of parallel actors. Yet, the so-called conspiratorial nominations by the six longs vary greatly by date, time and method of delivery. *See* the chronology of nominations, *supra.* Also, the longs reacted differently to Apex's overtures for flexibility. The Exchange minutes record that one broker reported: "Warren is flexible. Belcher is inflexible, but nowhere near as inflexible as Global. Global has [a] suit pending against Apex and will not be willing. They are out to bust them." Minutes 02755. Warren, in its separate reply brief, argues strenuously that it resolved its contracts with Apex amicably

and without extraction of concessions. *See* Warren reply at 8, 35.

In considering the proffered evidence intended to elevate proof of parallel action into the realm of conspiratorial inference, the Court is mindful of another controversial, but entirely lawful, incentive facing the longs. As discussed, there were serious, factually rooted rumors in the market in early February 1982 that Apex did not have enough oil to meet its obligations.

The fact that Apex might be caught without supply in the first delivery days of February presented the astute long with a possible opportunity for economic gain at Apex's expense. By nominating early and demanding delivery, an individual long stood to gain buy-out concessions or default penalties from a strapped Apex. Unless the product of concerted action, such activity is not an antitrust violation. The ability to lawfully seize an opportunity for gain, at the expense of another, is the soul of a free market. The desire to "get Apex" or "take advantage" may not be the stuff of Sunday school, but it is an engine of the marketplace. Even if each long suspected or knew the others were also moving to take advantage of Apex's shortfall, an inference of conspiratorial action does not arise without additional evidence of agreement. *Modern Home*, 513 F.2d at 110.

3. *Lack of Need.* Apex argues that the longs' lack of need for the oil is evidence of their conspiratorial action. Any analysis of this claim is closely related to that of economic incentives above. Apex's evaluations of need, even when construed in the most favorable light, simply do not tend to exclude an inference of independent action. In short, Apex's contention is that the longs demanded delivery solely to extract buy-out concessions from the oil-strapped Apex. Assuming for the moment that "need" can be defined at all in a highly liquid marketplace where traders, speculators, and marketers are all seeking a profit, the fact that several longs acted to gain at Apex's expense does not, standing alone, tend to exclude the competing inference of independent action.

If Apex had no oil in place at GATX in early February, a single long would be able to demand concessions by sticking to delivery whether or not the others did likewise. And each long might well have expected that other smart business people would do the same, but this consciously parallel behavior does not infer conspiracy where the individual long would have the identical motive to demand delivery whether or not he had conspiratorial bedfellows. *See Modern Home; Hunt*, 465 F. Supp. 195.

The preceding discussion, of course, assumed that "need" has a meaningful definition in a market of this type. In fact, it does not. A rational economic actor always has "need" for value. In early February, even a long who had no waiting buyer for the oil could reasonably conclude that the oil in a falling market was worth more early than late, even if storage would be necessary. When it is recalled that a long could also expect value in the form of a buy-out premium from Apex, the "need" for the oil becomes self-evident. Thus, Apex's statement that "Absent a need for oil early in February, it was contrary to the economic interests of the long defendants to seek early delivery" is nonsensical. Apex mem. at 79.

4. *Motive.* Motive evidence in this case does not tend to exclude an inference of independent action. Apex is certainly correct in its assertion that the longs had a motive to conspire to nominate early, demand delivery, and restrict Apex's access to oil supplies in New York Harbor; the identical motive, however, also supported individual action. Either way, they stood to reap enormous gains from a squeezed Apex. Thus, in this case, motive provides no inference of conspiracy. Given the market conditions in early February, even a long with the most malevolent of intentions had the same motive to act alone or in concert in demanding delivery. In both cases, he stood to get oil at the point in time when it was most valuable to him or receive a premium buy-out from Apex.

Apex has also argued that the long defendants were motivated by greed and animosity towards Apex. It offers a

hearsay statement by Raber that DiMauro expressed his hatred for Apex. W. aff. 24—Raber at 140-41. Apex's counsel has employed the word "greed" to imply nefarious conduct by the defendants. *See* Tr. at 97; Apex mem. at 82. It must be emphasized that greed may be an unsavory personal characteristic, but it is also at the heart of an active and free market where more disinterested observers might call it "profit motive." As discussed above, however, it is not unreasonable to infer that the longs harbored some animosity toward Apex and that the market conditions in early February may have presented an opportunity to recoup some of the January profits Apex had earned in the zero-sum game of commodities trading. Additionally, an Apex default could result in the award of penalties, which would be paid both to the Exchange and the victimized long.

Thus, while Apex has established that the longs had ample personal and financial motive to "get" Apex, this motive evidence fails to negate an inference of independent nonconspiratorial action. Courts have traditionally been reluctant to grant summary judgment in antitrust cases because issues of motive are often central, with credibility being a key issue. *See Poller.* But in a case such as this, motive is not a delicate factual issue because a long stood to gain either by acting alone or by acting in concert.

5. *Interfirm Communications.* Apex contends that there existed a high level of interfirm communications in this case which, together with the parallel conduct of the longs, supports an inference of conspiracy. Courts have held that a high level of communications among competitors can constitute a "plus factor" which, when combined with parallel behavior, supports an inference of conspiracy. *See., e.g., In re Plywood Antitrust Litigation*, 655 F.2d 627, 633-34 (5th Cir. 1981), *cert. dismissed sub nom. Lyman Lamb v. Weyerhauser*, 462 U.S. 1125 (1983); *Gainesville Util. Dep't v. Florida Power & Light Co.*, 573 F.2d 292, 301 (5th Cir.), *cert. denied*, 439 U.S. 966 (1978). However, detailed analysis of the evidence presented by Apex in "shotgun" fashion reveals

the inadequacy of these allegedly probative communications.

Apex's use of evidence of interfirm communications is marked by a persistent and troublesome element of circularity. Its entire presentation implies that the interfirm communications cannot be considered natural responses to common concerns, as in *Hunt*, because here the "common concern"—threat of default—was actually *caused* by the concerted effort of the longs in nominating early. Apex, the argument seems to go, would not have been in a tight spot if there had been no conspiracy; therefore these conversations are actually a response to the successful achievement of the conspiratorial objective—a "crunch"—and actually constitute further evidence of the conspiracy.

But this argument has it backwards: it assumes a conspiracy first, and then sets out to "prove" it. Under *Weit*, 641 F.2d at 461, once faced with uniform sworn denials from the defendants, Apex is required to supply evidence which tends to establish a conspiracy. It may not proceed by first *assuming* conspiracy and then explaining the evidence accordingly. If Apex can present independent evidence which tends to exclude an inference that the longs acted independently, then, and only then, may it use these conversations for whatever additional evidence of conspiracy they may provide. Until it can do so, these conversations are at best ambiguous.

a. *Denihan (Northeast)—DiMauro (Triad).* On February 1, Dennis Denihan of Northeast spoke to Sal DiMauro of Triad. Apex contends that "[i]t may reasonably be inferred that Denihan transmitted to DiMauro the information as to the short position of Apex" because Wahl of Apex had told Denihan of Apex's position on Friday, January 29. Apex mem. at 44.

No evidence of conspiracy may be gathered from this conversation. Sal DiMauro and Triad were brokers for Northeast (as well as other of the longs) for wet market transactions and Denihan testified that *wet* market transactions were discussed. M. aff. 6—Denihan vol. 3 at 174-75. It

is simply not reasonable to assume Denihan told DiMauro of Apex's short position and no basis for such an assumption has been provided. In any case, if Wahl of Apex was telling people of Apex's position, it could hardly be evidence of conspiracy if Denihan had told his broker.

b. *Berberich (Belcher)—Oliver (Northeast).* Apex alleges that on February 1, Berberich of Belcher spoke to Oliver of Northeast. There is, however, no admissible evidence that this conversation ever took place. The only proof of the conversation is a hearsay reference to Oliver's name in Berberich's notebook. W. aff. 65—Berberich Notebook A. Neither individual could recall the conversation.

c. *Berberich's Notes.* The alleged conversation between Oliver and Berberich is important to Apex, however, because Berberich's notebook for February 1 also contains the words: "demand delivery", "look for default", and "Merc EFP". *Id.* Apex seeks to establish that Oliver spoke to Berberich and communicated the information about Apex's short position that Oliver's co-worker, Denihan, had obtained from Ed Wahl of Apex. That complicated equation would establish a link between communications about Apex's short position and Berberich's notes. The chain Apex seeks to construct is improper. There is *no* admissible evidence that Berberich spoke to Oliver, much less that he and Oliver discussed Apex and Berberich later memorialized the conversation in his notes. To infer the contrary is sheer speculation.

On February 1 Berberich also wrote in his notebook: "Saturday, demand 12:01 Saturday a.m.," which meant requesting delivery of Belcher's contracts on February 6, the first delivery day. W. aff. 16—Berberich at 353. On February 2, Berberich wrote "promote crunch" in his notebook. Construing this evidence in the light most favorable to Apex, it supports an inference that Belcher intended to demand its oil early and put pressure for delivery on Apex. It does not tie Belcher to a *concerted* effort to harm Apex.

At oral argument, Apex's counsel contended that an inference of conspiracy flowed from the small size of Belcher's holdings: How could Belcher be acting alone and hope to promote a "crunch" of huge Apex with only 315 contracts? The fallacy in this argument is that the evidence indicates that Apex had little or no oil available for delivery at GATX on February 6, and it appears the market knew this fact. Thus, even assuming the falling market and its product needs had nothing to do with Belcher's nomination and malevolence was its sole motive, it could "crunch" Apex. By demanding its 315 contracts during the *first minute* of the delivery period, Belcher, acting alone, could reasonably have hoped to unilaterally pressure Apex and obtain default penalties or a premium price buyout. In fact, the basis for Apex's claims against the exchange defendants is that they refused to guarantee non-delivery of a single 300 contract Stinnes nomination slated for February 6. Thus, Apex is saying Stinnes successfully squeezed Apex with 300 contracts while Belcher could not hope to do so with 315. Apex cannot have it both ways. At its worst, Belcher's behavior is as consistent with independent business behavior as with a conspiracy.

d. *Slifka (Global)—Oliver (Northeast).* On February 3, Fred Slifka of Global called Donald Oliver of Northeast. This conversation is evidenced by the notes of Northeast's Denihan, who testified that he made the notes after a discussion with Oliver concerning the conversation with Slifka. The notes read:

DAO—

Re Merc Nominations

(1) All nominations in writing

(2) If not accepted NPC to demand $100.00/contract/day penalty for five days

At end of five days window NPC to demand 10 Pct penalty + oil + go to court

(3) NPC to go to newspaper and expose Exchange

(4) All loadings must be GATX

Even assuming Oliver discussed each of these matters with Slifka, this evidence does not tend to exclude the possibility of independent action. If one first assumes a conspiracy, as Apex's presentation does, discussion of these matters seems consistent with a conversation between two conspirators. This evidence, however, does not help to *prove* conspiracy because it does not tend to exclude the inference that the items discussed were a predictable response to existing conditions. While it could be imagined that the longs had conspired to pressure Apex, and Slifka and Oliver were merely discussing the final details of the effort, it is more likely that their conversation was a natural one between traders faced with a common concern: the possibility of an Apex default on deliveries.

Thus, in the face of an Apex shortage, it was not unreasonable for these competitors to discuss matters of common interest. Absent some showing that the content of the communications supports a reasonable inference of conspiracy, a discussion of shared concerns does not a conspiracy make. *Hunt*, 465 F. Supp. at 230-31. Mentions of default rules, written nominations, and threats against the Exchange are all consistent with a fear of default in a month when early barrels were desirable and Apex was short of oil. "All loadings must be at GATX" *could* mean the longs wanted to keep the pressure on Apex, but it is more reasonably considered innocuous in light of the fact that Apex itself had chosen GATX to make its deliveries. Significantly, Oliver later called Slifka to explicitly *reject* joint legal action by the oil firms against the Exchange. M. aff. 2, 9—Oliver at 270-272; Slifka vol. 2 at 20-21. These notes may be Apex's best evidence, but they too are ambiguous and consistent with independent conduct.

e. *Slifka (Global)—Wytrzes (Warren).* On February 3, Apex contends, Wytrzes told Slifka that Warren had nominated for February 6 and that he had heard that Apex would have trouble making delivery. This conversation is

memorialized by the notes of Andrew Wittenstein, an attorney for Global, who made them well *after* the alleged conspiracy terminated. Thus, even if the information in the notes constitutes an admission by Global, it is inadmissible hearsay as to the other longs because it was not made during the course of any conspiracy.

Most importantly, however, the alleged statements by Warren to Global concerning Warren nominations were made *after* Warren submitted its nominations. This makes them significantly less probative of conspiracy than if the conversation had considered nominations before they were made. Any statements concerning Apex's difficulties with delivery were natural considering the information already in the marketplace. This evidence does not support a reasonable inference of conspiracy in light of the competing inference that Warren and Global were acting alone but were faced with a common market crisis.

f. *Slifka (Global)—Berberich (Belcher).* On February 3, Slifka spoke to Berberich. Apex's version of this conversation is restricted to discussions of whether there would be a default in the market. Again, this discussion of a common concern is simply not evidence of conspiracy. In fact, Berberich admitted that he spoke to other industry members about the rumors of default. M. aff. 3—Berberich at 140-143. As Judge Weinfeld noted in *Hunt*, such behavior is natural in light of the concerns shared by all long defendants. It is also important that this conversation took place *after* Belcher submitted its nominations, when the concern about default would no doubt be high.

g. *Berberich (Belcher)—Oliver (Northeast).* Berberich also spoke to Donald Oliver of Northeast on February 3. During the conversation each acknowledged that his company held a long position and had submitted nominations. This is not evidence of any conspiracy.

h. *Costikyan (Belcher) — Oliver (Northeast).* On February 3 Thomas Costikyan of Belcher called Oliver to ask if Northeast wished to share a barge with Belcher for

receipt of oil on February contracts. Oliver declined. Apex observes that Oliver thought the call unusual. W. aff. 7—Oliver at 345. Berberich, on the other hand, testified that sharing had taken place before. M. aff. 3—Berberich vol. 3 at 112-113. What is most significant about this conversation, however, is that joint action was explicitly rejected by Northeast; thus an inference of *concerted* action is not supported.

i. *Slifka (Global)—brokers.* Slifka's phone records indicate that on the morning of February 4, he made calls to Triad and TIC. He also called Joel Faber and Jeffrey Atkin, floor brokers through whom Global purchased futures contracts. W. aff. 66—Slifka phone bill. These individuals were *Global's brokers.* A call to them by Slifka of Global presents no evidence of concerted action.

j. *Slifka (Global)—Belcher.* Slifka's phone bill reflects a call to Belcher on the morning of February 4. This fact alone is probative of nothing.

k. *Slifka (Global)—DiMauro.* Joe DiMauro testified that Slifka called him on the afternoon of February 4 to discuss whether deliveries would be made under the February contracts. W. aff. 22—J. DiMauro at 301-302. Joe DiMauro and his company were brokers for Global. Again, no inference of concerted action is presented by the conversation of a principal with his broker concerning market conditions of concern to both.

l. *Bertolami (Stinnes)—DiMauro.* Apex observes that Vito Bertolami of Stinnes was in "daily" contact with Joe DiMauro during early February. DiMauro's company was also a broker for Stinnes and communications between the broker and his client are consistent with, and essential to, independent action by the client.

m. *Eastern—DiMauro.* Apex contends that Eastern also "entrusted DiMauro with wide responsibilities for the trading of No. 2 heating oil on its behalf." Apex mem. at 52. This was perfectly consistent with independent action; DiMauro was Eastern's broker.

Apex's conclusion from all this is that "there existed a pattern of pervasive inter-firm communications during the crucial time period when the conspiracy was conceived and implemented." The record simply does not support such a statement. Apex no doubt hopes to bring this case within the ambit of *In re Plywood Antitrust Litigation*, 655 F.2d 627 (5th Cir. 1981), *cert. dismissed sub nom. Weyerhaeuser v. Lyman Lamb*, 462 U.S. 1125 (1983), where the court found the pattern of inter-firm communication a sufficient "plus factor" to make parallel behavior supportive of a conspiracy inference. In that case, however, the contacts between competitors were not only frequent but also highly probative of conspiracy. The court observed that "[t]he parallel pricing conduct clearly demonstrated in the record plus the numerous items of direct evidence of communication between high-level personnel on pricing policy adequately support the jury's verdict." 655 F.2d at 634. The record there contained many memoranda written by the alleged co-conspirators, explicitly detailing the discussions they had had with each other concerning pricing. As the Fifth Circuit observed, the plaintiffs had "unearthed damaging evidence from the mouths, or typewriters, of defendants' own employees." *Id.* at 633.

In the present case, once the communications between client and broker are excluded—as they must be—we are left with a total of *six* communications (two of which are of doubtful admissibility), between the six alleged co-conspirator longs, hardly a "pattern of pervasive inter-firm communications". It is significant that *none* of the communications involved Eastern or Stinnes and only *one* involved Warren. Of the six communications, one is represented by a phone bill, one resulted in a rejection of concerted action, and two involved nothing more probative than a discussion of default—a legitimate concern of all longs.

The remaining two items are the conversation between Berberich (Belcher) and Oliver (Northeast) allegedly memorialized in Berberich's notes, and the call between Slifka (Global) and Oliver (Northeast) summarized by the notes of Denihan (Northeast). This is Apex's best evidence. As discussed, however, even assuming these two conversations are supported by admissible evidence, and the notes recording them are construed liberally, they remain ambiguous. Both can support either an inference of conspiracy or an inference of independent conduct; the former does not tend to exclude the latter. None of these inter-firm communications rise to the level of those found probative of conspiracy in *In re Plywood Antitrust Litigation.*

6. *Inquiries at GATX.* The record indicates that in late January and early February 1982, inquiries were made by long defendants about the inventory of oil at GATX, the terminal selected by Apex for delivery under its February contracts. On January 28, Northeast's Houston office told Denihan, of Northeast's New York office, that inventory was low at GATX. W. Aff. 3, 8—Denihan Notebook; Denihan vol. 3 at 140. On February 3, Berberich (Belcher) called GATX to find out how much oil was there and how much of it was in Apex's name. W. Aff. 16—Berberich at 386. He learned that GATX held 520,000 barrels and Apex's inventory was negligible. *Id.* at 386-387. Berberich also wanted to determine who owned the barrels on hand at GATX although he could not recall whether he ever attempted to do so. W. aff. 59—Berberich at 147.

These inquiries more plausibly support an inference of independent action than concerted effort. By February 3, Belcher knew that Apex had selected GATX for delivery of Belcher's 315,000 barrels. Berberich's investigation is perfectly consistent with a concern over Apex's ability to supply the oil. There is also no evidence that Northeast's Houston office ever asked for, or received, information about Apex's inventory at GATX. Its inquiries are consistent with a prudent attempt to understand the market supply

position, particularly when Northeast held 748 long contracts and there was some question of the shorts' ability to provide oil.

An employee of GATX, Joseph Teleposky, testified that on Friday, February 5, he received telexes from some of the longs stating their intention to pick up oil at GATX the following day. He said that these were unusual. W. aff. 80—Teleposky at 101-102. Without more, this parallel conduct is not probative of conspiracy. In light of the threat of default that had emerged by February 5, it would be expected that each long would attempt to ensure that its delivery would be protected. The record reveals other efforts by longs to "dot all i's and cross all t's" in the face of a possible default. It is certainly more plausible that each long hoped to be in a solid position to take delivery or reap the benefits that default penalties would bring.

7. *Threats to Exchange and Clearing Members.* As mentioned above in the discussion of inter-firm communications, the notes of Denihan (Northeast) reveal that his boss, Oliver, and Slifka (Global) talked of suing the Exchange or going to the press. Apex contends further that Northeast and Belcher each threatened their clearing members with legal action if their nominations were not submitted as requested. W. aff. 84—Delivery Telexes at Denihan exs. 11 and 12; Delivery Telex at Berberich ex. 61.

The discussion between longs of possible action against the Exchange—not communicated to the Exchange—apart from tending to show that the Exchange was *not* a co-conspirator, does not establish anything save a discussion between two companies faced with similar problems and worried about the enforcement of their contract rights.

Likewise, the threats to sue clearing members are not probative of conspiracy. In fact, Northeast's telex does not threaten its clearing member, but instead advises the member to inform "seller", i.e. *Apex*, that failure to clear nominations will be a serious problem. Belcher did threaten *one* of its clearing members, but in the light of its concern over default, this action is consistent with independent action.

8. *Access to Supply.* As part of its conspiracy claims, Apex contends the long defendants conspired to refuse deals with Apex and to encourage others to do the same. Apex offers three pieces of evidence in support of this assertion:

a. *Stinnes Offer.* On February 1, Triad, Joe DiMauro's wet market brokerage firm, "offered" to sell Apex 300,000 barrels of No. 2 oil immediately on behalf of Stinnes. W. aff. 4—Parker at 387-388. Apex claims that when its chief trader, Gary Parker, called Sal DiMauro of Triad to express interest in the oil, Sal DiMauro said Stinnes would sell the oil at 87 cents or 87.1 cents per gallon, but he would confirm the offer only after talking to Stinnes. Ten minutes later, Sal DiMauro called Parker back and informed him that his brother Joe had told him the barrels were not for sale. Parker testified that Joe DiMauro said "Sal wasn't supposed to be offering those barrels out for sale." *Id.* at 388.

On February 2, when Wahl of Apex again asked Triad about available barrels, Sal DiMauro said 300,000 were available but at a cost of 97.5 cents per gallon. W. aff. 44—Wahl at 205-06. On February 3, during a meeting with Bertolami of Stinnes, Joe DiMauro called Paul Novelly of Apex and offered to sell Apex 1.5 million barrels of Stinnes oil at 93.5 cents per gallon. W. aff. 22—J. DiMauro at 250, 255. Apex declined that offer. *Id.* at 255.

Apex asserts that the contradictory positions taken by Triad regarding the price of the 300,000 barrels is evidence of a conspiracy to deny supply to Apex. Construing this evidence in the light most favorable to Apex, it reveals only that Stinnes realized it would be foolish to sell barrels at a lower price when Apex's shortage indicated that higher prices would be forthcoming. Stinnes had no obligation to assist Apex by selling oil to it at a low price. It is more plausible to infer from this evidence that after its first discussion Stinnes saw that Apex was in a bind and that it could get a premium for oil, and therefore ceased discussion a sale of 300,000 at a lower price, and later made a larger offer at a higher price.

Again, if, as Apex would like, one first assumes conspiracy, then this behavior may be seen as consistent with unlawful action. But this evidence is not *proof* of conspiracy because any inference of concerted action is unreasonable in light of the competing inference that Stinnes was a smart player in the market and narrowly avoided Sal DiMauro's loss of a profit opportunity.

b. *Amoco.* Through a tenuous chain of inferences, Apex argues that its inability to get oil from non-defendant Amoco to fulfill its February delivery obligations with Apex is evidence of a concerted effort by the defendants to restrict its access to No. 2 oil. Apex had contracts with Amoco for delivery of oil in January through March of 1982 and Amoco was encouraging Apex to take oil in January. W. aff. 4—Parker at 1085. Goldman Sachs & Co. told the Control Committee on February 4 that 750,000 Amoco barrels were expected at GATX in time to meet Apex's delivery obligations on February 6. But in early February, Amoco did not delivery the oil Apex expected to use to meet its futures market obligations. Apex contends that Amoco's failure to deliver resulted from the conspiracy.

Apex attempts to tie the long defendants to Amoco through two meals involving principals of Stinnes and Amoco. On January 26, Bertolami and Pat Marcello of Stinnes had lunch with Walt Buri of Amoco. Bertolami's expense vouchers reveal No. 2 oil was discussed. W. aff. 19—Bertolami at 638-39. On January 29, Bertolami and Joe DiMauro had dinner with Buri and Dom Olsen of Amoco. Again, the expense vouchers show No. 2 oil was discussed. *Id.* at 639-40.

Amoco agreed to deliver 400,000 barrels of No. 2 oil to Stinnes in February, with 200,000 barrels to be taken prior to February 5. Stinnes also requested an additional 400,000 barrels on an accelerated basis and sought February delivery of 200,000 barrels due in March 1982. W. aff. 78—Buri exs. 15, 17, 18.

Apex contends this behavior "suggests" a conspiracy to restrict access to supplies. It does not, however, even rise to

the level of a suggestion. Amoco witnesses testified, and Apex has offered no contradictory proof, that *no oil was owed to Apex for early February. See* M. aff. exs. 29, 30—Buri at 77-85, 126-27. The Amoco-Apex contracts provided that specified amounts of oil had to be delivered in each of the months of January, February, and March, with no delivery dates specified. W. aff. 78—Buri exs. 1, 2. In this light, the meals involving Stinnes and Amoco hardly bear discussion. Subsequent events bear out that a discussion of No. 2 oil transactions, unrelated to Apex, was probable. There is no inference of conspiracy here. Finally, Stinnes' oil deals with Amoco for February simply show that it needed the oil, a fact that directly undercuts one of the main pillars of Apex's case for conspiracy—lack of need.

c. *Warren and Karam.* Apex argues that the refusal of Warren to participate in a book transfer involving Karam Petroleum Company, Warren, and Apex is evidence of a conspiracy by the long defendants to squeeze Apex by refusing to deal. Warren owed Karam oil, Karam owed Apex oil, and Apex owed Warren oil so the obligations of all three, including those of Apex to deliver to Warren, could be wiped out by book transfers among them. Warren, however, refused to use the oil it owed Karam to offset the barrels owed to it by Apex.

There are numerous problems with Apex's proffer of evidence. First, as noted earlier, Karam himself never said Warren refused to do the transfer because Apex was involved; instead, what Apex has offered is Wahl, of Apex, reporting Karam's report of rumors that Warren was out to get Apex. These statements by Wahl are of little probative value and double hearsay.

Second, the compelling inference in this context is that Warren rejected the book transfer for proper business reasons. Karam owed Warren 15,000 barrels from January and 40,000 prompt February barrels. Affidavit of James C. Graham in Support of Warren reply ("G. aff.") 1—Wentworth Exs. 196-98; G. aff. 2—Wytrzes vol. 3 at 39-44; G. aff. ex. 11—Karam ex. 2c. Prompt barrels were those due

and owing immediately. By contrast, Warren owed Karam 40,000 barrels deliverable anytime in February and another 40,000 deliverable during the last two weeks of February. Warren had paid Karam a premium to be able to obtain the barrels early in February and repay them late in February. G. aff. 2, 11—Wytrzes vol. 3 at 39-44; Karam exs. 2c, 2d.

Thus, Warren had bargained for, and received, the right *not* to give Karam its barrels in early February and its refusal to do an early February book transfer involving Apex was consistent with this bargain. To do an early February book transfer with Karam and Apex would have been contrary to Warren's economic interest. In fact, Warren's arrangement with Karam shows the value of "early" oil to Warren and the other longs in a falling market and thus demonstrates the innocent purpose behind demanding early delivery in February.

9. *DiMauro and "hold harmless."* On the evening of February 5, Joe DiMauro had a conversation with Gary Parker of Apex on a speaker phone while Ed Wahl and Steve Wirkus of Apex listened. Apex in its brief claims DiMauro "flatly stated that he was acting on behalf of all long defendants" and that "DiMauro further indicated his familiarity with the conspiracy to squeeze Apex but, in denying his own involvement, tried to lay the blame on Sun Trading." Apex mem. at 60.

Apex's characterization of this February 5 conversation is highly misleading. It should be noted at the outset that this "evidence" comes from the uncorroborated accounts of the telephone conversation supplied by three Apex participants taken in depositions subsequent to the commencement of this action. The accounts (1) do not purport to be verbatim recitations, (2) contradict each other, (3) are not supported by contemporaneous memoranda, and (4) are flatly denied by DiMauro. Taken in the light most favorable to Apex, the most that can be said is that DiMauro stated he represented Global, Stinnes, Eastern, and Belcher, his brokerage clients, not Warren and Northeast and that whoever was "doing this," it was not DiMauro, but Sun Trading.

Apex tries to shore up its argument that DiMauro was aware of a conspiracy on February 5 by arguing that on February 6, he attempted to obtain a "hold harmless" agreement from Apex on behalf of himself and his clients. Apex's use of the request for a hold harmless is inappropriate for two reasons. First, it is undisputed that Parker threatened DiMauro during their conversation on February 5. M. aff. 25—Parker at 534-35; W. aff. 44—Wahl at 282. Second, Parker, the only Apex employee who heard both sides of the February 6 conversation, testified that DiMauro made the request solely on his own behalf. While Wahl and Wirkus evidently felt differently, Parker, the only person on the Apex end of the phone, did not understand DiMauro to be seeking a "hold harmless" on behalf of any long. M. aff. ex. 25—Parker at 908; *but see* W. aff. 39, 44—Wirkus at 814-815; Wahl at 292-93. These two facts support a strong inference of independent, and prudent, action by DiMauro in seeking a "hold harmless" agreement for himself.

10. *Inventory Transfers.* Apex argues that the nominations by Warren and Global for inventory transfers at GATX when neither company had storage there is evidence that the long defendants pressured Apex and drove up the price of oil. It is true that Warren had no agreement with GATX in February 1982 for storage. Two Apex witnesses testified, however, that spot storage was available at GATX and not unusual. G. aff. 5, 6—Wirkus at 935; Wahl at 256. Inventory transfer would not require separate storage space. Wentworth of Warren testified that Warren would usually wait to arrange spot storage until it was certain storage was needed. G. aff. 1—Wentworth vol. 2 at 112A-113A; *see also* G. aff. 2—Wytrzes at 2A-53. Taking the oil by inventory transfer also made sense for a New York area trader such as Warren because the nomination could be passed to others at GATX, thus saving transportation costs. M. aff. 7—Wentworth vol. 3 at 69-71. In any case, as Atkin told the Control Committee, Warren was flexible as to delivery, Minutes at 02755, and in fact ultimately did agree to defer delivery and take the barrels by book transfer. Warren's

conduct is consistent with independent, rational business behavior.

It is also true that Global had no regular storage space at GATX and no significant marketing operations in New York. Global, however, often traded in New York, M. aff. 38—Global Transactions, and leased storage space, W. aff. ex. 20—Slifka at 2-8—2-9. Slifka of Global testified that he arranged to lease some of Stinnes' storage space when he learned from his broker, DiMauro, that it was available. *Id.* there is nothing in this activity that supports an inference of concerted action.

11. *Vessel Nominations.* Apex contends that an inference of conspiracy can be drawn from the designation by Northeast of vessels that would not be available at GATX at the appointed times. None of this evidence is probative of conspiracy.

a. *AMERICAN HAWK.* On February 2, Northeast nominated to take 200,000 barrels of No. 2 oil aboard the tanker American Hawk on February 8 at 8:00 a.m. Apex observes that the tanker needed to discharge ballast before receiving oil, but GATX could not receive pumped ballast. Denihan's notebook also reflects that the barge would not be in New York until noon on February 8 and Northeast never amended its nomination to reflect this change.

There are two problems with this evidence. First, the record indicates that the American Hawk's ballast could have have been pumped at sea onto another barge. M. aff. ex. 43, 44—Ciaskewicz at 125-26; Stesney at 81. Second, Denihan's notebook entry is ambiguous, but even if construed as Apex urges, it is not probative of conspiracy. The Exchange rules provide that Northeast could have changed its nomination to receive the oil on the AMERICAN HAWK when it was ready to load. Even assuming Denihan knew the barge would be late, a four hour delay in 200 out of 748 contracts is hardly suspicious, no less probative of conspiratorial behavior. Certainly Northeast could also have told Apex of the delay before February 8. This never came

to pass, however, because Apex and Northeast settled on February 5.

b. *SONAT 81.* Denihan's notebook reflects that the SONAT 81 barge, nominated to pick-up Northeast oil on February 10, 1982, was to leave Northeast's system on January 30, 1982. Apex contends that because the barge was given back to Sonat, its nomination for February 10 was bogus and suspicious. This nomination was not only outside the "window" of conspiracy, which Apex represented at oral argument to have ended on February 8, but Northeast also settled with Apex on February 5, thus obviating the need for the barge. There is no evidence in the record that the barge could not have been chartered for February 10. Indeed, an employee of Sonat testified that the barge was available on short notice. M. aff. 45—Rose at 95-96.

c. *INTERSTATE 70.* Charles Rose, of Sonat, testified that the INTERSTATE 70 barge could not make the three round-trips between GATX and New Haven, Connecticut within the timeframe of Northeast's nominations. W. aff. ex. 81-Rose at 64-66. Mr. Rose's qualifications to comment on the ability of a barge to make round trips between GATX and New Haven are unclear. Nor is it clear what hypothetical facts he assumed. But even if the Rose testimony is taken at face value, it is probative of little other than that Northeast's schedulers were less than perfect. The three scheduled pick-ups at GATX were for February 6, 8, and 10. As noted, any nominations for delivery after February 8 would occur after the alleged conspiracy. The fact that in scheduling the INTERSTATE 70 pickup on February 8 Northeast might have overestimated the barge's speed in making the New Haven run is not evidence of conspiracy.

In a strange twist, Apex also asserts evidence of conspiracy arises from the fact that Belcher paid to hold the OCEAN 262 on standby from February 2 until February 5, when it settled with Apex. W. aff. 82—Costikyan ex. 56. While Belcher witnesses admitted that this was unusual, it is consistent with the possibility that the barge might have been

needed to take delivery and is not probative of any conspiracy. Thus, we see Apex offering as evidence of unlawful action *both* the failure to have barges available by Northeast *and* the maintaining of a ready barge by Belcher. This contradiction speaks for itself.

(5) *Overview*

The detailed review of each piece of evidence in this case was essential because of the amount of material presented by Apex. When faced with that mass of material, offered in an amorphous manner, there is a strong temptation to conclude that "something" illicit must have gone on. Even innocent explanations of each individual piece can seem somehow suspicious when a mountain of material must be confronted. Matters are further confused by the fact that many of the actions and statements by defendants would make sense in the context of a conspiracy. They do not, however, tend to *prove* a conspiracy. They are equally consistent with independent non-conspiratorial action. Apex's presentation of this case depends on the hope that it can seize the high ground and start from a premise of concerted action. The law, however, requires that, once met with sworn denials from the defendants, *Apex* must demonstrate a material issue of fact by supplying significant probative evidence tending to exclude an inference of independent action. As the Supreme Court made clear in *Interstate Circuit*, denials under oath by the alleged conspirators present a major hurdle to any antitrust plaintiff. The inference of conspiracy found in *Interstate Circuit* was due in part to the *failure* of the principals of the defendants to deny their involvement. 306 U.S. at 225-26.

Similarly, Apex may not prove conspiracy by hearsay admitted under a co-conspirator exception without first establishing the existence of a conspiracy by independent non-hearsay evidence. Again, Apex may not presuppose a conspiracy and work backwards. An illustration of Apex's attempt to turn the case on its head, is the argument by Apex that the disparity among nomination dates, times, and delivery methods "only goes to establish what a skillfully thought

out conspiracy it was . . . ." Tr. at 97. This type of "Catch-22" reasoning is plainly inappropriate. In fact, there is not a scintilla of evidence that any longs jointly considered the details of their individual nominations.

DiMauro is the focus of Apex's attention because, as a broker for Global, Stinnes, Eastern, and Belcher, he is the closest thing to a link between the longs. "yet, the mere opportunity to conspire, even in the context of parallel business conduct, is not necessarily probative evidence." *Weit*, 641 F.2d at 462. There is no probative evidence of DiMauro's participation which tends to exclude the inference that he was simply present and acting as a broker for his clients.

When the evidence in this case is taken piece by piece, it does not add up to a triable case because the sum of zeros is still zero. Viewed as a whole, the case also fails to supply an inference which is reasonable in light of the powerful inference of independent response to existing economic conditions. At its best, the evidence offered tends to establish that each long defendant, matched with a short without product in a month of falling prices, decided that it stood to make the most profit by demanding its oil in the first three delivery days of February 1982: Either prompt and valuable oil would result, or a premium buy-out with possible default sanctions against Apex would be gained. This business decision, which lies at the heart of the long defendants' actions, does not require, nor does it imply, a conspiracy.

Accordingly, summary judgment is granted to the long defendants on Claims I-IV.

COMMODITIES MANIPULATION: CLAIM V

Apex's fifth claim alleges manipulation of the futures market for No. 2 oil in violation of the Commodity Exchange Act ("the Act" of "CEA"), 7 U.S.C. § 13(b), which makes it unlawful:

> for any person to attempt to manipulate the price of any commodity in interstate commerce, or for future delivery on or subject to the rules of any contract market . . . or

> knowingly to deliver or cause to be delivered for transmission through the mails or in interstate commerce by telegraph, telephone, wireless, or other means of communication false or misleading or knowingly inaccurate reports concerning crop or market information or conditions that affect or tend to affect the price of any commodity in interstate commerce.

Section 13c(a) of 7 U.S.C. imposes liability as a principal on any person: (1) "who commits, or who willfully aids, abets, counsels, commands, induces, or procures the commission of, a violation of any of the provisions" of the Act; (2) "who acts in combination or concert with any other person in any such violation"; or (3) "who willfully causes an act to be done or omitted which if directly performed or omitted by him or another would be a violation of the provisions" of the Act.

Apex's claim under the CEA has two elements. First, it alleges that the long defendants manipulated the futures market for No. 2 oil in February 1982 by creating or exploiting a "squeeze" and forcing Apex to purchase oil at inflated prices. Amended Complaint ¶¶ 72, 73. Second, Apex alleges that the long defendants communicated false reports in violation of the CEA. *Id.* at ¶ 74. (Although the amended complaint includes the exchange defendants within the claim of manipulation, Apex has not argued that Raber or the Exchange were party to any manipulation.)

1. *Manipulative Scheme*

Apex's claims for manipulative activity under the CEA are virtually coextensive with those for conspiracy. Specifically, Apex alleges that the defendants unlawfully manipulated by:

> —conspiring to nominate for early delivery of their No. 2 oil, with knowledge that Apex could not physically satisfy the nominations;
>
> —limiting Apex's access to No. 2 oil in New York Harbor during early February;
>
> —conspiring not to deal with Apex for No. 2 oil in the first week of February; and

—agreeing not to modify their delivery nominations. Apex mem. at 141-42; *see also* Amended Complaint ¶¶ 36-38, 40.

Apex contends that these activities violated Section 9(b) of the CEA because they constituted conduct "intentionally engaged in which resulted in a price which does not reflect basic forces of supply and demand." *Cargill, Inc. v. Hardin*, 452 F.2d 1154, 1163 (8th Cir. 1971), *cert. denied sub nom. Cargill, Inc. v. Butz*, 406 U.S. 932 (1972), and that the long defendants acted together to either create, or unlawfully take advantage of, a "squeeze" on Apex. A "squeeze" is characterized in *Cargill* as a situation where "deliverable supplies of the commodity in the delivery month are low, while the open interest on the futures market is considerably in excess of the deliverable supplies." *Id.* at 1162. For a manipulative "squeeze" to be created, however, "market dominance" by the defendant or defendants is needed because "a squeeze cannot be successfully executed unless a long has sufficient control of enough futures contracts to force the shorts to come to him to settle their contracts." *Id.* at 1164.

There is considerable dispute in this case over the existence of a squeeze, the causes of the squeeze if one existed, and the market dominance of the accused longs. But since it is not disputed that no individual long alone possessed "market dominance," Apex must rely upon concerted action to prove a manipulation. Thus, the Court need not reach difficult questions of intent, market condition and market dominance that have troubled courts in manipulation cases. Apex has failed to present evidence that raises a material issue of fact as to a conspiracy to do *anything* among the defendants. *See* antitrust discussion, *supra*. Without a conspiracy, there can be no manipulation in this case and, therefore, summary judgment must be granted to the long defendants on that portion of Claim V alleging unlawful manipulative activities.

2. *False Reports*

Apex asserts the long defendants are liable under the CEA for proliferation by them and their brokers of "false or misleading or knowingly inaccurate reports." Apex, however, has failed to supply even the rudimentary details of the evidence upon which it bases this claim. The specific statements have never been cited by Apex or supported by admissible evidence, nor has Apex explained the relationships between the long defendants and any speaking brokers. Apex has not demonstrated who made what statements on whose behalf. In a brief footnote, Apex merely asserts that the "misrepresentations made on behalf of one of the long defendants are binding on all of the participants in this conspiracy. *Pinkerton v. United States*, 328 U.S. 640 (1946)." Apex mem. at 164 n.8. By once again lumping evidence and defendants together, Apex apparently hopes that the Court will *assume* something nefarious must have taken place. There are, however, numerous problems with Apex's approach.

The first difficulty on this "reports" claim arises because Apex has not raised a material issue as to conspiracy. Thus, the Court cannot treat the remark of one long or one agent as binding all co-conspirators. Instead, the Court is left without any framework in which to evaluate the alleged statements: Not only have no actual statements been presented by Apex, but also there is no way to determine on whose behalf any brokers made statements.[2] This is a critical failing because, in addition to claiming that some longs themselves made statements, Apex relies on two alternative theories of liability to hold the longs for remarks by brokers: aider and abetter liability under Section 13(a) of the CEA, and traditional agency principles. Thus, in the absence of a conspiracy, the Court is unable to analyze these claims in any

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[2] In a disingenuous footnote, Apex asserts: "At least for purposes of this motion, the existence of these false or misleading statements has been conceded. *See* Long Defendants' Statement Pursuant to Rule 3(g) ¶ 79." Apex mem. at 157 n.6. That 3(g) statement however, simply summarizes Apex's contentions concerning the statements. It does *not* concede the existence of the statements.

meaningful way and Apex has therefore failed to demonstrate a genuine issue of material fact as to liability for any false reports or statements.

Even assuming (1) specific statements, (2) by specific actors, (3) tied factually and legally to specific defendants, Apex's claim of manipulation by false statement must fail. Taking the alleged unlawful statements from Apex's answers to contention interrogatories, they may be organized into four general categories: "Apex does not have the oil," "Apex could not make delivery," "Apex would default," and "Apex was going to get their's." *See* Affidavit of James C. Graham in Support of Motion for Summary Judgment on the Fifth Claim ex. E.—answer No. 49. Even if these types of statements are somehow considered "reports" involving "interstate commerce," they are at most rumors, predictions and opinions characteristic of a vibrant futures market and could easily have been prompted by legitimate concerns about Apex's ability to meet its obligations on the February contracts. In the context in which they appear, they are not actionable misrepresentations.

Without addressing how the foregoing statements could be actionable, Apex asserts broadly that "false statements are actionable misrepresentations when they are made in bad faith or with intent to deceive." Apex mem. at 160 (citation omitted). Even assuming such statements as these to be actionable if made with the requisite malicious intent, Apex has proffered no evidence of that intent. Conclusory allegations are plainly insufficient at this stage of the litigation. Summary judgment is required on this portion of Claim V as well.

FAILURE TO REGULATE: CLAIM VII

(1) *Introduction*

Apex claims the Exchange and Raber violated the CEA, 7 U.S.C. §§ 7(d) and 7a(8), by failing to remedy the market manipulation by the longs in February 1982. It contends that, with knowledge of the manipulative conspiracy, they chose not to exercise statutory authority to preserve a fair

market and help Apex. This behavior was allegedly intended by the Exchange "to protect its own self-interest and the self-interest of its vice chairman, defendant Raber," Apex mem. at 200, and avoid a "loss of investor confidence." *Id.* at 220.

Apex's claim for failure to regulate under the CEA faces a major hurdle which it has failed to surmount. Only bad faith conduct by the exchange defendants is actionable under the CEA. Bad faith arises "when self interest or other ulterior motive unrelated to proper regulatory concerns is alleged to constitute the sole or dominant reason for the exchange action . . . even though the action was not beyond the bounds of reason." *Sam Wong & Son, Inc. v. New York Mercantile Exchange*, 735 F.2d 653, 677 (2d Cir. 1984). Apex has the burden at trial of proving this bad faith. Since the exchange defendants have denied any such behavior and point in their briefs to the absence of any factual issue, Apex must demonstrate the existence of a genuine issue of material fact as to whether the exchange defendants acted in bad faith. Since Apex has failed to do so, summary judgment must be granted in favor of the exchange defendants.

(2) *Facts*

At the risk of some repetition, it is worth setting forth separately those facts applicable to the exchange defendants' motion.

The Exchange's first involvement in the market crisis came on February 3, when floor broker Jeffrey Atkin told the Exchange's Control Committee (the "Committee"), chaired by Richard Helfer, that "he had learned from industry sources that Apex did not have oil to deliver to his customers," and that "one or two of his customers were out to get Apex." Minutes 02702; W. aff. 93—Mancusi at 145-46. That same day, Apex's clearing member, Goldman Sachs, assured the Committee that Apex would have oil available to keep GATX pumping continuously for several days. Affidavit of William Hegarty ("H. aff.") 7—Apex Admission ("A.A.") 93.

Coincidentally, on February 3, 1982 the Exchange's board of governors also met to approve revisions in the delivery rules for No. 2 oil contracts. W. aff. 96—Helfer ex. 5. The new rules had three provisions that Apex considers significant. First, they would allow longs to designate a five day period, or "window," during which delivery would be effected. Rule 150.09(A)(2)(f). Second, the new rules would require all longs to give shorts 72 hours notice of any proposed delivery. Rule 150.09(A)(3). Third, the rules would permit shorts who were unable to clear delivery by the original delivery method to submit revised delivery instructions. Rule 150.09(A)(4)(b).

In a memorandum to the Commodity Futures Trading Commission accompanying the proposed rules, the Exchange governors wrote that the new rules "formalize the Exchange's current delivery procedures." W. aff. 96—Helfer ex. 5. From this Apex argues that the Exchange was aware that mandatory early delivery on a futures contract was contrary to existing practice.

The Committee met again on February 4 with a new acting chairman, defendant Raber. Helfer had stepped down on advice of counsel because one of his clients on the Exchange held a futures position for No. 2 oil in a later month. Raber, a metals trader, had no relation to No. 2 oil contracts. It was at the February 4 meeting chaired by Raber that Goldman announced Apex had 750 contracts coming from Amoco to GATX and another 400 contracts owned by, or owed to, Apex at GATX. By this time, the Committee knew that longs had nominated 657 contracts for February 6, 50 for February 8, and 70 for February 10. A.A. 96.

Later on February 4, the Committee met again to hear Goldman state that the Amoco oil had been held up, but would be at GATX on February 5 or 6. A.A. 102. Goldman was informed by the Committee that assurances were needed by February 5 that the oil would be in place. Minutes 02749. After the Goldman presentation, the Committee and its staff met with clearing members representing longs

matched with Apex. Minutes 02752. Timothy Bishop of Apex was also contacted and told of the seriousness of the situation and the possibility of penalties. H. aff. 3—Bishop at 353-354. The Committee then sought to verify the nomination dates submitted by the longs and determine whether there was any flexibility as to the dates requested. Minutes 02753.

The notes of Committee member and Exchange Vice President for Compliance Patrick Thompson reveal that at the February 4 meeting the Committee considered the declaration of an emergency, the fixing of a price by the Exchange, or the changing of delivery times and sites. W. aff. 74. None of these measures were adopted.

On February 5 the crisis deepened when Goldman announced to the Committee that the "[p]roblem is worse than we thought last night." Minutes 02758. Goldman stated that it had told Apex to "get moving to talk with actual longs to work out flexibility." *Id.* Goldman told the Committee that only 127 contracts could be ready at GATX and, later that day, that Apex could actually deliver only 60 to 85 contracts at the terminal, and the Amoco oil would *not* be available for February 6, 7, and 8. Minutes 02768; A.A. 142-43.

On February 4 and 5, the Committee also met with clearing members representing longs matched with Apex and urged them to change delivery times and sites. Minutes 02753-54, 60, 62; H. aff. 3—O'Shaughnessy at 368. The Committee told both the long clearing members and Goldman that "if it [were] determined that any clearing member, long or short, intended to defame or cause intentional problems to the Exchange and the commodity industry as a whole, the Exchange will bear down on that clearing house." Minutes 02751; *see also* Minutes 02751, 02754.

By the close of business on February 5, all Apex contracts nominated for delivery on February 6 had been resolved except one 300 contract nomination by Stinnes through its clearing member, Conticommodity Inc. ("Conti"). Edward O'Shaughnessy, an employee of Conti, appeared before the

committee on February 5 to discuss the nomination but told the Committee he had no authority to resolve it. H. aff. 3—O'Shaughnessy at 170-71. Instead, he referred the Committee to TIC, Stinnes' broker for the 300 contracts.

Raber asked O'Shaughnessy to arrange a meeting between himself and a representative of TIC so that Raber could discuss the outstanding 300 contract nomination. *Id.* Raber agreed to meet defendant DiMauro, President of TIC, that evening at the Market Bar restaurant in the lobby of the World Trade Center, downstairs from the Exchange offices.

Both Thompson and Helfer were opposed to such a meeting. Helfer told a meeting of Committee staff members and Raber that he "could not condone anything that [was] being done at that point." W. aff. 28—McFadden at 228; *see also* Helfer at 122-23. According to Thompson, Helfer angrily added that "You are all going to jail, you can't do this . . . these people are taking us to the cleaners and you are going to jail if you agree to what they are trying to make you do . . .. You know what is going on around here, they are making people pay 97 cents for oil." W. aff. 56—Thompson at 156-57. Helfer then wrote out the following statement which he asked Raber to sign: "Please be advised that Richard Helfer bears no responsibility for any decision made on behalf of the Control Committee regarding difficulties concerning the delivery of the Feb. 1982 heating oil contract." W. aff. 96—Helfer ex. 1. After Raber signed the paper, Helfer left.

Raber met with DiMauro at the Market Bar restaurant. Both testified that Raber urged DiMauro to work out the nominations with Apex and told him that default was in no one's interest. H. aff. 3—Raber at 139-43; DiMauro at 381-83. After the meeting with Raber, DiMauro spoke with Parker of Apex to discuss possible resolution of the 300 contracts nominated for February 6, the next day. H. aff. 3—DiMauro at 388; Parker at 530. Their discussion was hostile and unproductive. *Id.* Parker at 534.

Also on February 5, Goldman raised technical objections to the Stinnes nomination with the Exchange. It claimed the

nomination was invalid because (1) on February 4, when the nomination came in, the Exchange told Goldman not to worry about it; (2) the inventory transfer method of delivery requested was not a recognized method under the Rules; (3) Stinnes had failed to "confirm the availability of the method of delivery from the seller" prior to filing its delivery instructions. W. aff. 98.

That same evening, at a meeting of the Committee, Raber spoke to O'Shaughnessy of Conti. O'Shaughnessy testified that at one point during the meeting, Raber exclaimed something similar to: "I don't give a F--- about you, all I care about is the exchange and my son coming into my business." W. aff. 35—O'Shaughnessy at 198.

The Committee's discussion of the 300 contract nomination continued until after midnight on February 5. Seevers of Goldman testified that the Exchange told Goldman that resolution would be deferred until Monday, February 8. We aff. 36—Seevers at 583. Seevers called Apex and told them no delivery on the nomination would be required over the weekend. W. aff. 36—Seevers at 584.

Rosemary McFadden of the Exchange testified that on Saturday morning, February 6, Richard Leone, President of the Exchange, notified Daniel Amstutz of Goldman that if the 300 contract nomination was not satisfied that day and the Exchange denied the objections on Monday, February 8, the Exchange might determine that Apex had been delinquent and was subject to penalties. W. aff. 28—McFadden at 232-33. McFadden herself called Bishop of Apex on Saturday and told him that "the delinquency clock could be running." *Id.* at 233-35. Applicable penalties included: (1) a delinquency penalty of $100 per contract per day (up to five days) to be paid to the opposite party, and 10% of the contract value per day (up to five days) to be paid to the Exchange; and (2) liquidated default damages payable to the opposite party of 10% of the contract value. Rules 150.15(A)(2)(a)-(b), (B)(2). On February 6, Apex settled with Stinnes by entering into an EFP at a price of 97.5 cents per gallon. H. aff. 3—DiMauro at 453. *Both* Apex and Conti

were left angry with the Exchange. H. aff. 3—Bishop at 381-82; O'Shaughnessy at 368-72.

Apex claims that the evidence demonstrates that the Exchange and Raber were aware of a conspiracy against Apex. Notes that Patrick Thompson made at the Committee meeting of February 5 contain the word "longs" beside the word "collusion." W. aff. 74—Thompson ex. 5. As discussed above, Patricia Lyons of Apex recorded that Raber told her on February 10 that he was aware of a "conspiracy (Lyons' term) to 'squeeze the shorts.'" W. aff. 72—Lyons ex. 7. Finally, in a memorandum dated February 17, Apex employee Bryant Foster reported that on February 10, Raber used the words "sting," "collusion," and said some longs had been "out to get Apex." W. aff. 97.

(3) *The CEA Claim*

Apex must come forward with evidence tending to prove not merely that the Exchange and Raber erred or even acted in part from some improper motive, but that "self interest or other ulterior motive unrelated to proper regulatory concerns" was the "sole or dominant" reason for their actions. *Wong*, 735 F.2d at 677. As the late Judge Friendly pointed out in *Wong*, "if the governors sincerely and rationally believe their action is in the public interest, there should not be liability simply because the action has the incidental effect of advancing their private interests or damaging someone whom they do not like." *Id.*

Apex appears to level the following charges against the Exchange and Raber:

(1) The Exchange acted in pure self-interest to avoid a loss of investor confidence like that which accompanied the 1976 "Potato Fiasco" which self-interest gives rise to an inference of bad faith;

(2) Raber exhibited his bad faith when he made a statement that could fairly be construed as declaring that his actions were based on a desire to preserve his business and ensure that his son would inherit it;

(3) Raber and the Exchange, with knowledge of the conspiracy to squeeze Apex, refused to interpret the rules to allow Apex to defer delivery and thus contributed to the manipulation; this refusal was so irrational as to give rise to an inference of bad faith.

While it is true that " 'bad faith' cannot be defined with mathematical precision and an ultimate definition depends upon the facts and circumstances of a particular case," *Mitchell v. Hercules, Inc.*, 410 F. Supp. 560, 568 (S.D. Ga. 1976), the facts recited above amply demonstrate that Apex has failed to raise any issue as to whether bad faith was the sole or dominant motive of either the Exchange or Raber in the first week of February 1982. We turn to each claim.

(1) *Investor confidence:* This allegation does not merit lengthy discussion. Action to preserve investor confidence is action to preserve the integrity of the marketplace and is in the public interest. The mere fact that the public interest and the Exchange members' interest are parallel does not support an allegation of bad faith: "Should a governor vote in favor of . . . a rule in the belief that the rule serves the public interest, even if also in the expectation and hope that it would serve his personal interest, his behavior would not give rise to liability." *Bishop v. Commodity Exchange, Inc.*, 564 F. Supp. 1557, 1562 (S.D.N.Y. 1983). Here, the exchange defendants could not maintain investor confidence in the Exchange and its market without also maintaining the value of their interests in the Exchange: "If such a degree of self-interest were allowed to demonstrate bad faith, then Exchange board members involved in futures markets would inevitably be subject to bad faith charges and the concept of Exchange self-regulation would be undermined." *Wong*, 735 F.2d at 672.

It is also significant that once Governor Helfer wisely stepped aside, no member of the Control Committee had a personal stake in any heating oil contracts. Thus, the bad faith claim is even weaker here then in *Wong*, where the exchange governors were alleged to have a personal interest in the contracts at issue.

(2) *Raber:* The much-quoted Raber statement that "I don't give a F--- about you, all I care about is the Exchange and my son coming into my business," is not inconsistent with action to protect the public interest. The fact that the statement was made to representatives of the longs and not Apex is further evidence of Raber's desire to protect the marketplace. In a memorandum of questionable admissibility, Bryant Foster of Apex recorded that Raber also stated he had chosen not to convene a meeting of the Exchange Board of Governors because he hoped to avert any action which would trigger default and a repetition of the fiasco the Exchange had experienced in the potato futures market in 1976. We. aff. 97. These facts, if true, do not create a genuine issue as to whether Raber was prompted by an ulterior or self-interested motive that was inconsistent with action taken in the public interest.

(3) *Irrationality:* Apex's fall-back position on bad faith is derived from a footnote in *Wong*. There, the court observed that conduct which lacks "a minimal requirement of some basis in reason" may lead to an inference of bad faith. 735 F.2d at 678 n.32. Apex contends failure to "police price manipulation, accomplished with the knowledge that one half the market had conspired against the other, rise[s] to the level of irrationality sufficient to support an inference of bad faith." Apex mem. at 217.

As discussed above, there is insufficient probative evidence either of a conspiracy to manipulate or that the exchange defendants knew of any such conspiracy. The statements of Raber, offered by Apex, are misconstrued and made after any alleged conspiracy ended. What Raber may have thought after all was said and done does not establish the state of his knowledge on February 5 and 6. Helfer's emotional statements are of little evidentiary value, particularly in light of the fact that he admittedly had an interest in heating oil contracts.

Moreover, the evidence actually demonstrates that the conduct of the exchange defendants, whether or not wise in highsight, had ample basis in reason. The record shows that the Exchange was concerned about the delivery situation in early February and received untrustworthy assurances from Goldman that Apex could make the required deliveries at GATX. When the truth became known on February 5, the Exchange faced a crisis and considered all possible reasons for the market difficulties: (1) manipulation by *Apex*, (2) a natural congestion, or (3) conspiracy by longs. The Control Committee then decided on a policy of mediation or "jawboning."

Representatives of the Exchange had numerous meetings with both sides in an effort to ease the crisis and succeeded in resolving all outstanding February 6 nominations by the evening of February 5 with the exception of the Stinnes 300 contract nomination. Apex's obligations were clear on February 6 when the Exchange's President Leone told Apex that it should honor the Stinnes nomination or risk severe penalties if its objections to the nomination were overruled on Monday, February 8.

Apex quarrels with the Exchange's refusal to declare an emergency and give Apex a way out on the single nomination of 300 contracts. In light of the fact that many thousands of contracts were outstanding in future months, the Exchange had every reason not to shake the confidence of investors, (which Apex contends they were trying to preserve), by taking extraordinary measures over a 300 contract nomination. Instead, the Exchange took steps to resolve the outstanding delivery obligation through negotiation.

Apex's contention that the Exchange acted irrationally by not adopting Apex's interpretation of the rules is without merit. Construing the evidence in the light most favorable to Apex, the Exchange simply read ambiguous rules in a manner unfavorable to Apex. While it may have been possible, and even customary, for deliveries to be "flexible" and deferred by agreement, any such agreement was entirely voluntary under the rules. And, as discussed earlier, any

prior practice of deferring delivery is of little probative value where, as Apex admits, September 1981 to February 1982 was a unique period and February was the only month within that period with falling prices and a significant number of early nominations. While the Exchange may have refused to give Apex all desired assurances, it actually acted to help Apex under the rules by jawboning the longs into accepting proposals for EFP's and deferred delivery.

The longs contend that Apex amassed a huge unliquidated short position in February heating oil contracts and thus ran the risk that the Exchange would enforce the existing rules by their terms and allow longs to insist on the honoring of their nominations. Apex, they argue, played this highstakes game in the hope that if the crisis went too far the rules would be turned its way. It is not necessary to accept this persuasive argument for the Court to conclude, taking the probative facts in the light most favorable to Apex, that Apex's true quarrel with the Exchange is that it failed to interpret the rules as Apex would have liked. This does not raise an issue of bad faith.

Apex's brief is marred by vicious and unwarranted personal attacks on Raber which are apparently designed to convince the court that he was a loose cannon, acting irrationally and in bad faith. These irrelevant and unprofessional references to Raber's drinking only serve to raise an inference that Apex is blowing smoking in the fervent hope that the Court will assume the presence of fire. Summary judgment is granted to the Exchange and Raber on Claim VII.

ANTITRUST AND THE EXCHANGE DEFENDANTS

Apex's antitrust claims against Raber and the Exchange are "that these defendants, through their actions and inactions during February 1982, made what was only an attempted price fixing conspiracy a successful reality. The success of the conspiracy depended materially on the Exchange's and Raber's decision to do nothing to stop it." Apex mem. at 213. In short, Apex believes the exchange defendants are liable for their "knowing acquiescence in the

larger conspiracy" of the long defendants and their nonfeasance in not calling it to a halt. *Id.* at 214.

This claim may be disposed of quickly. The Court has already concluded that summary judgment must be granted on Apex's conspiracy claims against the long defendants. Thus, there was no conspiracy for Raber and the Exchange to acquiesce in and summary judgment must be granted to them on any antitrust claims.

Even if a conspiracy among the long defendants had been satisfactorily established, Apex has still not pointed to evidence raising a material factual issue as to whether Raber or the Exchange joined it. Put another way, in the face of explicit denials by the defendants, Apex has failed to meet its burden of producing significant probative evidence which tends to exclude the inference of independent non-conspiratorial action on the part of the Exchange and Raber. *Matsushita*, 106 S. Ct. at 1357.

Apex contends that the evidence of frequent communications between the exchange defendants and the conspirators "strengthens the inference of conspiracy and provides another genuine issue of material fact for proper resolution at trial." Apex mem. at 215. This argument is without merit.

Membership in a conspiracy may not be inferred from mere association. As Judge Weinfeld of this court has written:

> It is a black letter law that to hold one as a participant in a conspiracy, he must by word, deed or conduct intentionally join the illicit enterprise; mere association with conspirators and presence at the scene of a conspiracy, even coupled with knowledge that wrongful conduct by others is being engaged in, are not by themselves sufficient to support an inference of knowing and intentional attachment to an illegal enterprise.

Hunt v. Mobil Oil Corp., 465 F. Supp. 195, 231 (S.D.N.Y. 1978) (footnote omitted), *aff'd mem.*, 610 F.2d 806 (2d Cir.

1979). Raber and the Exchange had numerous communications with *both* Apex and the longs in their "jawboning" effort to resolve the difficulties in the first week of February. The concern of the exchange defendants that the potato fiasco not be repeated is not probative of conspiracy; rather it demonstrates a desire to *avoid* conspiracy. In this regard, it is also significant that the exchange defendants had no imaginable motive to conspire to manipulate their *own* market.

The fact that the exchange defendants may have known that certain longs disliked Apex simply does not infer an acquiescence by them in a concerted plot. On the contrary, discussions by various longs of possible threats of legal action or public attacks on the Exchange—offered by Apex as evidence of conspiracy by the longs, *see* Apex mem. at 120—tends to disprove any conspiracy between the longs and the Exchange. *See* Apex mem. at 120. In sum, Apex has presented no evidence that is inconsistent with independent action by the exchange defendants to resolve a troublesome market crisis. Construing the facts in the light most favorable to Apex, there is no genuine issue of material fact as to participation by Raber and the Exchange in a conspiracy in February 1982 and accordingly, summary judgment as to them on any antitrust conspiracy claims must be granted.

Finally, even if there had been a conspiracy and the Exchange defendants joined it, there is no evidence of the required bad faith. *See P.J. Taggares Co. v. New York Mercantile Exchange*, 476 F. Supp. 72 (S.D.N.Y. 1979); *see also* the discussion of the absence of bad faith conduct by Raber and the Exchange, *supra*.

Apex argues that, whatever the case under the CEA, bad faith is not a prerequisite to antitrust liability of the exchange defendants. It is sufficient for present purposes to note that the Court agrees with Judge Weinfeld that a charge of bad faith "is essential when the conduct complained of, as here, is closely related to the exchange's performance of its statutory duty to maintain a fair and orderly market." *Id.*

at 78. This requirement is essential for two reasons. First, commodity exchanges often must make it their business to impose a price on the market and impose restraints to alleviate market disputes. *See* Reply Affidavit of Peter W. Leight 2—F. Edwards at 624. Lowering the antitrust plaintiff's "bad faith" threshold, coupled with the threat of treble damage liability, would inhibit proper Exchange regulatory action necessary to maintain an orderly market.

Second, the bad faith requirement in the context of CEA claims would make no sense in the absence of a similar standard in the antitrust area. The result urged by Apex would allow plaintiffs to circumvent the CEA by recasting disputes with exchanges under the act in terms of "restraint of trade"—a term easily applied since the exchange regulates an active market.

Accordingly, summary judgment is granted to the Exchange and Raber on all antitrust claims.

COMMON LAW FRAUD: CLAIM VIII

In its eighth claim for relief, Apex alleges that the long defendants fraudulently represented to Apex (1) that their decision to nominate a large percentage of the No. 2 oil due them on the first three delivery days on the February 1982 Exchange contracts was a result of each long defendant's independent decision based upon valid business reasons and (2) that the nominated delivery dates were chosen for legitimate business reasons. Apex claims that in justifiable reliance upon misrepresentations it paid excessive prices to the long defendants for the No. 2 oil in order to meet its obligations under the February contracts.

At a trial, Apex would have the burden of proving fraud by clear and convincing evidence. *Ajax Hardware Manufacturing Corp. v. Industrial Plants Corp.*, 569 F.2d 181, 186 (2d Cir. 1977). This "clear and convincing standard of proof should be taken into account in ruling on summary judgment motions . . . ." *Anderson v. Liberty Lobby, Inc.*, 54

U.S.L.W. 4755, 4759 (1986).[3] While *Anderson* does not authorize a trial on affidavits, a Court must consider the substantive evidentiary standards in deciding whether the case requires submission to a jury. *Id.*

In order to prove its fraud claim, Apex must establish (1) that the defendant made a false representation of a material fact; (2) that the defendant intended to deceive Apex; (3) that Apex justifiably relied upon the misrepresentation and (4) that Apex was injured as a result of such reliance. *Indees v. American University of the Caribbean*, 546 F. Supp. 1342, 1346 (S.D.N.Y. 1982). Apex contends (1) that the longs' "need" for oil was falsely represented to Apex by the nominations made on February 2-5 and in telephone conversations, and (2) the longs' intent to adhere to their early nominations was falsely represented to Apex in telephone conversations.

First, there is no evidence in the record before the Court to support a finding that a nomination is a representation of "need." A nomination, as defined by the rules of the Exchange, is merely the giving by the buyer "of written delivery or loading instructions to the seller." Rule 150.09. Every buyer is required to make such a nomination whether or not it needs the oil. The reasons underlying the purchase and nomination may vary: the buyer may need the oil for its own use, or to trade with others to mitigate potential losses in a falling market, or it may seek to reap a profit form taking advantage of a known or rumored overextended seller. Whatever the reason for the purchase the nomination itself is not a representation of "need" for the oil.

The other claimed misrepresentations were statements allegedly made by telephone by representatives of Belcher New Jersey, Inc., the Belcher Company of New York, Inc., Belcher New England, Inc., Warren, and Northeast to Edwin

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[3] *Anderson* arose in the context of libel litigation; however, the Supreme Court's holding applies to "all litigants regardless of the substantive nature of the underlying litigation." *Anderson*, 54 U.S.L.W. at 4760 n. 1 (Brennan, J. dissenting); *but see* 54 U.S.L.W. at 4763 (Rehnquist, J. dissenting).

Wahl of Apex. Apex alleges that in these conversations Wahl was told or led to conclude that these companies (1) intended to adhere to the terms and conditions of the nominations that they had previously submitted to the Exchange and (2) had a need for the oil as nominated or would have such a need in the very near future.

Before addressing the merits of the claims, the Court notes that these conversations do not involve the Coastal Corporation, Coastal States Marketing, Inc., Belcher Oil Company, DiMauro, Triad, TIC, Stinnes Corporation, Stinnes Interoil, Inc., Northeast Petroleum Industries, Inc., Northeast Petroleum Corporations, and Eastern. Apex argues that these other defendants are liable because the statements were made in furtherance of a conspiracy against Apex. Since Apex has failed to raise a triable issue of fact as to the existence of any conspiracy, its attempt to impute statements of certain defendants to others under a conspiracy theory must fail.[4] Thus, there is no evidence that these other defendants made any misrepresentations and, therefore, summary judgment is granted to them on the eighth claim for relief.

The defendants alleged to have made representations, Northeast Petroleum Corp., Warren, The Belcher Company of New York, Inc. and Belcher New Jersey, Inc., argue that Apex was under an absolute contractual duty to deliver the oil on the date nominated and, accordingly, Apex could not rely to its detriment on their alleged representations of need. Where a plaintiff claims it was induced by representations to do that which it was already legally obligated to do there is no causal connection between the alleged misrepresentation and any injury to the plaintiff. *See, e.g., Ryan v. J. Walter*

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[4] Apex suggests in its memorandum that misrepresentations may be imputed to the remaining defendants under the principle of aiding and abetting a common law fraud. Apex has not, however, alleged, much less offered evidence to prove, that anyone "aided and abetted" a fraud. Aiding and abetting fraud—like fraud itself—must be pleaded with particularity *Armstrong v. McAlpin*, 699 F.2d 79, 92-93 (2d Cir. 1983); *see also* Fed. R. Civ. P. 9(b). Having failed to allege aiding and abetting, that theory of inputing liability too must fail.

Thompson Co., 453 F.2d 444 (2d Cir. 1971), *cert. denied*, 406 U.S. 907 (1972); *The Toledo Trust Company v. Nye*, 588 F.2d 202 (6th Cir. 1978); *Coons v. Kidder, Peabody & Co., Inc.*, 539 F. Supp. 1145 (S.D.N.Y. 1982).

Apex admits that if it were legally obligated to deliver the oil on the date nominated, the fraud claim must fail. Apex mem. at 192-93. Apex asserts, however, that the Court may not find that Apex was legally obligated to delivery the oil because (1) the nature of its contractual obligation is a disputed issue of material fact, and (2) the defendants may not rely upon the contract because they were acting pursuant to an unlawful conspiracy. The latter of these two grounds is vitiated by the grant of summary judgment on all conspiracy claims. Thus, the Court is left with the issue of Apex's contractual obligation. The parties argue at length about whether extrinsic evidence of industry practice may be considered by the Court on this point. Such evidence "is permitted for the purposes of qualifying the meaning of a contract where otherwise ambiguous...." *Western Union Telephone Co. v. American Communications Ass'n, C.I.O.*, 299 N.Y. 177, 184 (1949). The question not addressed by either Apex or defendants is whether the issue of Apex's contractual obligation is material.

The parties do sharply dispute the terms of the contract. Defendants argue that the combination of the rules and the nominating forms create an unambiguous obligation for a short to deliver at the time and in the manner nominated by the long. Apex counters with allegedly admissible evidence of an industry practice under which longs usually agree to take delivery throughout the month. This practice, it contends, raises a material fact issue as it its obligations. There is no need, however, for the Court to parse the rules and forms to determine whether an issue of fact exits as to the contractual obligation to deliver because, in the context of this case, any such analysis is irrelevant.

As events unfold in the early days of February 1982, it was not the contract (nor defendants' representations), but the *Exchange*, and its power to impose severe sanctions for non-

compliance with the terms of the contract as the Exchange interpreted them, which caused Apex to honor the nominations and to pay premiums to various defendants. The Exchange refused to rule on the validity of the February contracts when Apex sought to have the Exchange stretch out its delivery obligations but, as Apex states in its brief, "beginning on February 3, 1982 and continuing thereafter, the Control Committee took the position that Apex was required to make delivery under the February contracts at precisely the times nominated by the long defendants." Apex mem. at 93.

Thus, whether or not Apex had a pre-existing legal obligation to deliver the oil based on the contract, Apex perceived an overriding obligation to make delivery based upon the position taken by the Exchange and clearly acted in reliance on that perception when resolving its delivery obligations. Indeed, Apex has conceded as much: "Because the delinquency penalties are so severe . . . both in terms of actual dollars and in damage to reputation, the Exchange's refusal to rule on the validity of the Stinnes nomination and its threat to make a retroactive finding of delinquency compelled Apex to pay defendants [extortionate prices]." Apex mem. at 100.

After construing the evidence in the light most favorable to Apex, this Court holds that no reasonable jury could find that Apex acted in reliance upon anything other than is perception that the Exchange would impose severe and reputation-harming sanctions for failure to deliver on the dates nominated. Seen in this light, it is evident that the alleged misrepresentations by the defendants were not material and that Apex did not rely upon any such misrepresentations. The Court reaches the same conclusion whether or not the "clear and convincing" standard applicable in causes of fraud is applied to Apex's proofs at this stage of the proceeding. *See Anderson*, 54 U.S.L.W. 4755.

Apex has also failed to raise a material fact issue as to the other elements of an action for fraudulent misrepresentation. First, Apex has failed to demonstrate that any actual

falsehoods were uttered. There is no evidence to indicate that statements such as "I intend to adhere to my early nomination" were not truthful when made. No doubt the longs would have adhered to their nominations if Apex had not bought them out. And, as discussed earlier, statements of need are not misrepresentations in a market of this sort. Every participant in an active market has need for value and it stretches the bounds of semantics for Apex to assert that a representation of need could be false in this context.

Finally, while materiality and reliance are always closely related in the context of a fraud action, it may separately be said that Apex could not justifiably rely upon any of the alleged misrepresentations even in the absence of an overriding obligation imposed by the Exchange. No reasonable jury could believe that, in the aggressive trading on the Exchange, Apex would perform any act because another market participant "needed" or "wanted" performance.

Summary judgment is granted to defendants on Claim VIII.

SECTION 4b: CLAIM VI

In the Sixth Claim for Relief, the long defendants are each charged with violating Section 4b of the CEA, 7 U.S.C. § 6b, which provides in pertinent part:

> It shall be unlawful . . . for any person, in or in connection with any order to make, or the making of, any contract of sale of any commodity for future delivery, made, or to be made, on or subject to the rules of any contract market, for or on behalf of any other person . . .
>
> (A) to cheat or defraud or attempt to cheat or defraud such other person;
>
> (B) willfully to make or cause to be made to such other person any false report or statement thereof, or willfully to enter or cause to be entered for such person any false record thereof;
>
> (C) willfully to deceive or attempt to deceive such other person by any means whatsoever in regard to any such order or contract or the disposition or execution of any such order or contract or in regard to any act of

agency performed with respect to such order or contract for such person; or

(D) to bucket such order, or to fill such order by offset against the order or orders of any other person, or willfully and knowingly and without the prior consent of such person to become the buyer in respect to any selling order of such person, or become the seller in respect to any buying order of such person . . .

"[Section] 4b, to put it mildly, is not an easy provision to construe . . . 'While the intent to outlaw fraud is clear from the (A)—(C) subparagraphs, the syntactical mess which precedes then makes it difficult to answer some basic questions about coverage.' " *Leist v. Simplot*, 638 F.2d 283, 322 (2d Cir. 1980) (Friendly, J.) (citation omitted), *aff'd sub nom. Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, 456 U.S. 353 (1980). Judge Friendly did, however, offer guidance as to the reach of 4b when he wrote that the section is not "limited to cases coming within its crabbed language," *id.* at 323, and it does not only prohibit " 'any person' from defrauding 'any other person' in connection with the making of a futures contract for or on behalf of that other person." *Id.* at 322.

The defendants have moved for summary judgment on the grounds that Section 4b applies only to persons who act "for or on behalf of" the plaintiff in making a futures contract; since none of the long defendants acted for or on behalf of Apex, they argue, the claim should be dismissed. Thus, the central question raised by defendants on this motion is whether 4b can be read to apply to brokered transactions between longs and shorts as to hold principals accountable to each other. Defendants argue that this question was not resolved in *Leist*. This Court disagrees and finds that Judge Friendly's expansive interpretation of 4b encompasses a case such as this. Even under this broad reading of 4b, however, summary judgment must be granted to defendants because no reasonable jury could conclude that they committed any of the proscribed acts.

As stated earlier, there is no genuine issue of material fact as to any claimed fraudulent or false statement by any long.

First, no actionable statements were made. And second, in the context of the Exchange's stance regarding the enforcement of early nominations, long statements as to why they were insisting on early delivery were neither material nor relied upon by Apex.

While there is evidence that a long or longs may have been out to "get" Apex and that Apex was not well liked after having massively sold the market short, there is no factual issue raised that any long sought to cheat, defraud or deceive Apex. As has been discussed, the decisions of certain longs to nominate for early delivery and to stand on those nominations were in accordance with the rules of the Exchange as that body chose to interpret and enforce them. The fact that Apex was ultimately placed in the position of having to pay premium prices for oil to cover its delivery obligations was not the result of cheating or deceit. Rather, it resulted from the proper play of market forces, the action of the Exchange, and the high risk strategy of Apex in amassing its short position in the first place.

No genuine issue of material fact exists as to a violation of Section 4b of the CEA and summary judgment is therefore appropriate on Claim VI.

CONCLUSION

Summary judgment is granted to the defendants on all eight claims in the Amended Complaint and those claims are dismissed. The Court need not reach the various *in limine* motions or Stinnes Corporation's separate motion for summary judgment. All motions and cross-motions for sanctions pursuant to Fed. R. Civ. P. 11 are denied.

So Ordered.

Dated: New York, New York
August 8, 1986

UNITED STATES DISTRICT JUDGE

No. 87-631

Supreme Court, U.S.
FILED
NOV 16 1987
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

THE COASTAL CORPORATION, *et al.*,

Petitioners,

– against –

APEX OIL COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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TABLE OF CONTENTS

	Page
Table of Authorities	ii
Counter-Statement of the Case	2
Reasons for Denying the Petition	11
I. The Petition Presents No Issue Upon Which Certiorari Should Be Granted, But Rather Seeks A Judicial Re-Evaluation Of The Evidence Presented	11
1. Because *Monsanto* And *Matsushita* Were Properly Applied As To Petitioners, The Decision Below Is Consistent With The Rulings Of This Court And Decisions Rendered By Other Courts Of Appeal	12
2. Petitioners Obvious Purpose Is To Engage This Court In A Lengthy Re-Evaluation Of The Evidence Considered Below	15
3. Petitioners Seek Review Of A Denial Of Summary Judgment That Does Not Preclude Them From Presenting Their Arguments To A Jury Or To The Courts Following Any Adverse Judgment	16
II. The Court Of Appeals' Decision Is Wholly Consistent With The Decision In *Bourjaily*	17
Conclusion	19

TABLE OF AUTHORITIES

Cases:	Page
Anderson v. Liberty Lobby, Inc., 477 U.S. 574, 106 S. Ct. 2505 (1986)	15-16
Bourjaily v. United States, ____ U.S. ____, 107 S. Ct. 2775 (1987)	15, 17, 18
Brotherhood of Locomotive Firemen & Enginemen v. Bangor & A.R. Co., 398 U.S. 327 (1967)	16
Estelle v. Gamble, 429 U.S. 97 (1976)	16
Glasser v. United States, 315 U.S. 60 (1942)	17
Hamilton - Brown Shoe Co. v. Wolf Brothers & Co., 240 U.S. 251 (1916)	16
Layne & Bowler Corp. v. Western Well Works, Inc., 261 U.S. 574 (1923)	14
Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 106 S. Ct. 1348 (1986)	*passim*
Monsanto Co. v. Spray-Rite Service Corp., 465 U.S. 752 (1984)	*passim*
Oregon Fish and Wildlife Dep't v. Klamath Tribe, 473 U.S. 753 (1985)	14
United States v. National Bank of Commerce, 472 U.S. 713 (1985)	14
United States v. Nixon, 418 U.S. 683 (1974)	17

	Page
Constitutional and Statutory Provisions:	
7 U.S.C. § 6b (Commodity Exchange Act § 4b) . .	2
7 U.S.C. § 7a(8) (Commodity Exchange Act § 5a(8))	2
7 U.S.C. § 7(d) (Commodity Exchange Act § 5(d))	2
7 U.S.C. § 13(b) (Commodity Exchange Act § 9(b))	2
7 U.S.C. § 13c(a) (Commodity Exchange Act § 13(a))	2
15 U.S.C. § 1 (Sherman Act)	2
15 U.S.C. § 2 (Sherman Act)	2
New York Gen. Bus. Law § 340 (McKinney 1968)	2
Federal Rule of Evidence 104(a)	17
Federal Rule of Evidence 801(d)(2)(E)	17
Other:	
R. Stern, E. Gressman & S. Shapiro, *Supreme Court Practice* (6th ed. 1986)	14

No. 87-631

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

THE COASTAL CORPORATION, *et al.*,

Petitioners,

– against –

APEX OIL COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

Respondent Apex Oil Company[1] ("Apex") respectfully submits this brief in opposition to the petition for a writ of certiorari filed by petitioners in this matter.

[1] Apex Oil Company is a Missouri general partnership and, thus, has no parent company. The general partners are two Missouri corporations: Novelly Oil Company ("Novelly") and Goldstein Oil Company ("Goldstein"). Novelly has no parent company. The parent company of Goldstein is S.C.R. Investment Company. Apex Oil Company, Novelly and Goldstein have no subsidiaries (except wholly owned subsidiaries) or affiliates as those terms are used in Supreme Court Rule 28.1.

Counter-Statement of the Case

1. *Preliminary Statement.* -- Apex commenced this action in March 1982 against the petitioners and others[2] alleging violations of Sections 1 and 2 of the Sherman Act (15 U.S.C. §§ 1 and 2), Sections 5(d), 5a(8), 4b, 9(b) and 13(a) of the Commodity Exchange Act (7 U.S.C. §§ 7(d), 7a(8), 6b, 13(b) and 13c(a)), Section 340 of the New York General Business Law (McKinney 1968) and the common law.

Apex's amended complaint alleges that, commencing no later than February 1, 1982, the long defendants engaged in a concerted attempt to manipulate the market for No. 2 oil in New York Harbor (14a-16a). Seeking to accomplish collectively that which could not be achieved individually, the long defendants conceived of, and implemented, a scheme for the early nomination of, and, thereafter, continued early demand for, No. 2 oil deliverable during February 1982 in New York Harbor, pursuant to February contracts for No. 2 oil ("February Contracts") *(Id.)*. This scheme had the purpose, and effect, of artificially raising the price of No. 2 oil, thereby allowing the long defendants to achieve supracompetitive profits (*Id.*).

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[2] For the convenience of the courts below, the defendants were divided into two groups. The "long defendants" are: (i) Joseph DiMauro ("DiMauro"); (ii) Triad Petroleum, Inc. ("Triad"); (iii) TIC Commodities, Inc. ("TIC"); (iv) The Coastal Corporation, Coastal States Marketing, Inc., Belcher Oil Company, The Belcher Company of New York, Inc., Belcher New Jersey, Inc. and Belcher New England, Inc. (collectively "Belcher"); (v) Stinnes Corporation and Stinnes Interoil, Inc. (collectively "Stinnes"); (vi) Eastern of New Jersey, Inc. ("Eastern"); (vii) Northeast Petroleum Corporation and Northeast Petroleum Industries, Inc. (collectively "Northeast"); and (viii) George E. Warren Corporation ("Warren"). Also included is former defendant Global Petroleum Corporation ("Global"). The "exchange defendants" are: (i) the New York Mercantile Exchange ("Exchange"); and (ii) Julian Raber ("Raber"), Vice Chairman of the Exchange.

Certain defendants, including Global, were dismissed from the case prior to these proceedings pursuant to stipulations and, in one case, pursuant to court order. Two other defendants, Northeast and Warren, settled with Apex on appeal, one following oral argument and the other following entry of the Court of Appeals' decision and judgment.

After discovery, the defendants filed six motions for summary judgment, collectively encompassing each of the claims asserted in the amended complaint. The District Court granted summary judgment on all claims, and it therefore entered judgment dismissing the amended complaint.

The Court of Appeals affirmed in part, reversed in part and remanded. The court found a triable issue of conspiracy among Global, Northeast and Belcher, but affirmed the District Court with respect to the other defendants.[3] In so ruling, it found the following facts to be undisputed.

2. *Record Evidence.* -- The rules of the Exchange provided that any February Contracts not liquidated by Friday, January 29, 1982 -- the close of trading for such contracts -- would be matched long with short (10a). At the close of trading, Apex was short 4,378 contracts. Of the 4,906 February Contracts open at the close of trading, 1,945 were held by the long defendants, or their affiliates (10a-11a).[4]

On February 1, 1982, as required by the rules, Apex designated delivery sites for all of its February Contracts (11a). Following past practice, GATX terminal in Carteret, New Jersey, was initially designated for 4,281 contracts (*Id.*, 23a). BP Terminal at Tremley Point, New Jersey, was designated as the delivery site

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[3] That portion of the Court of Appeals' opinion and judgment affirming the District Court is the subject of a Petition for a Writ of Certiorari filed with this Court on behalf of Apex on October 17, 1987. *Apex Oil Company v. DiMauro, et al.*, No. 87-633 (hereinafter referred to as "Apex Petition").

[4] These contracts were held as follows:

Northeast	748
Global	362
Belcher	315
Stinnes	300
Warren	170
Eastern	50

for the remaining contracts[5] (*Id.*). On the same day, pursuant to Exchange rules, each long defendant submitted "Notice of Intention to Accept Petroleum Products Futures." The Clearing House then matched up longs and shorts for delivery (11a-12a).

All but 15 of the open long positions held by the long defendants were designated by the Exchange for delivery by Apex (12a). The Exchange rules then required each long to nominate a delivery date and method by 4:30 p.m. on the 5th business day of the month, here February 5, 1982 (*Id.*). The first day for which delivery could be sought was February 6, 1982 (*Id.*).

Prior to February 1982, the nominations by holders of long positions typically sought delivery throughout the month (11a-13a). Moreover, it was not unusual for long and short parties to be flexible in the actual timing and location of delivery. Even in December and January, when, as in February, the market price of No. 2 oil was falling (23a-24a), none of the long defendants bunched their nominations together during the first few delivery days (12a). In addition, they observed industry practice and changed their initial nominations when necessary to facilitate delivery by reasonably spreading deliveries throughout the month (*Id.*). As the Court of Appeals noted, by way of example,

> in December 1981 and January 1982, the nominations of the long defendants were spread fairly evenly throughout each month. The actual delivery dates differed from the nominated dates for roughly two- thirds of the nominations. The actual delivery method was changed in two-thirds of the nominations. The actual location for delivery differed in nearly one-third of the nominations.

(12a).

This pattern was broken in February 1982 (13a). It is undisputed that the long defendants nominated a large number

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[5]As in prior months, Apex designated a limited portion of its delivery obligations from the BP Terminal to facilitate truck deliveries (46a).

of contracts for the first few delivery days (*Id.*). In over 75% of these nominations, delivery was demanded for one of the first three delivery days (23a- 24a). Significantly, only 19% of the long positions held by non- defendants were nominated for this period (*Id.*). Further, the Court of Appeals' own calculations indicated "that while over half of the contracts held by defendants were nominated for the first day of delivery, only about 10% of contracts held by nondefendants were nominated for the first day"(13a).

On February 3, a broker representing several long interests passed along a rumor on the floor of the Exchange that Apex would not be able to make delivery, and, that afternoon, when the Exchange Control Committee met to resolve any market problem, he appeared before the Control Committee, repeated the rumor and stated that, " 'one or two' of his customers were 'out to get Apex' " (13a). Similar rumors circulated among a number of other brokers and oil companies *(Id.)*.

When Apex's initial expectations of sufficient oil at GATX to meet the extraordinary number of nominations were frustrated, it requested changes in delivery dates, methods or sites. The Exchange also requested, but did not require, changes in delivery dates and sites. All of these requests were either ignored or rejected by the long defendants. As a result of this inflexibility, Apex was forced to purchase oil from the long defendants at inflated prices in order to meet its delivery obligations. As the Court of Appeals stated, "there is evidence that while the closing price for February contracts was 89.7¢ per gallon, Apex paid prices as high as 97.5¢ per gallon to several long defendants for oil that was immediately delivered back to the long defendants to satisfy Apex's delivery obligations. These purchases of oil enabled Apex to avoid a default" (14a).

3. *The Opinion and Judgment Below.* -- The Court of Appeals began its analysis by noting that "the . . . grant of the [summary judgment] motions was founded upon the district court's perception of a lack of evidence of a conspiracy" (16a).

The Court of Appeals therefore "focus[ed] primarily on . . . whether there is an issue of fact as to the existence of a conspiracy" (*Id.*).

The court recognized that " 'conduct as consistent with permissible conduct as with [an] illegal conspiracy does not, standing along, support an inference of antitrust conspiracy' " (17a, *quoting Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, ____, 106 S. Ct. 1348, 1357 (1986)). Instead, "[t]here must be some evidence that 'tends to exclude the possibility that the [defendants] were acting independently' " (*Id., quoting Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752, 764 (1984)). "Thus, evidence of parallel conduct alone cannot suffice to prove an antitrust conspiracy" (*Id.*).

The Court of Appeals then examined this Court's decision in *Matsushita*, which established that "[i]f the scheme alleged is implausible, a conspiracy must be proved by strong direct or strong circumstantial evidence, and the implausibility of a scheme will reduce the range of inferences that may permissibly be drawn from ambiguous evidence" (18a). The court observed "that the conspiracy alleged herein seems plausible, as evidenced by the apparent ability of some defendants to sell oil to Apex at prices significantly over market" (*Id.*).

Concluding that the scheme was plausible, the court next examined "whether on the evidence presented it could reasonably be concluded that the higher prices came about as a result of a conspiracy, rather than through independent action of the defendants" (*Id.*). Having recognized that parallel conduct alone is not enough, the Court of Appeals considered the existence of certain "plus" factors identified by Apex -- motive to conspire and a high level of interfirm communications. The court explicitly recognized that "such factors in a particular case could lead to an equally plausible inference of mere interdependent behavior, i.e., actions taken by market actors who are aware of and anticipate similar actions taken by competitors, but which fall short of a tacit agreement." It observed that "[i]n such a case, a court might find it difficult to hold that the parallel acts 'tend to exclude the possibility' of independent action" (20a).

The Court of Appeals then proceeded to consider what it termed "the strongest evidence of a conspiracy offered by Apex" (22a). This consisted of certain entries in a notebook kept by an official of Northeast memorializing a telephone conversation on February 3 between Fred Slifka, an officer of Global, and another Northeast official. The entry reads:

> *DAO*
>
> Re Merc Nominations
>
> (1) All nominations in writing
>
> (2) If not accepted, NPC [Northeast] to demand $100/contract/day penalty for 5 days
>
> At end of five days window NPA to demand 10 pct penalty + oil plus go to court
>
> (3) NPC to go to newspaper and expose exchange
>
> (4) All loadings must be GATX
>
> [Portion obliterated].

(22a).

The court stated, "[u]nder the circumstances herein, we believe a reasonable inference could be drawn that this notebook entry evidences an agreement between Slifka of Global and Oliver of Northeast to take the actions set forth in it" (22a). It rejected the District Court's conclusion "that since Apex itself picked GATX as the place of delivery, 'it is more likely' that the conversation was a natural one between traders faced with the possibility of an Apex default on deliveries; that it was merely a discussion of shared concerns" (*id.*), reasoning that "there was some evidence indicating that Apex has not in the past been held to its initial selection of a delivery site," and, further, "that if these two parties truly were concerned primarily with early delivery of the oil, a better way to ensure delivery might have been to show some flexibility as to the mode and place of delivery" (23a).

The Court of Appeals also expressly disagreed with the District Court's acceptance of "the long defendants' assertion that since the price of No. 2 oil was falling at the time the nominations were made, no issue of fact could exist as to the motivation behind the early nominations [because in the defendants' view,] it was sensible to accept the oil early so that a higher price could be charged on resale" (*Id.*). It reasoned:

> [A]ssuming prices were falling, it was not inevitable that early nomination would be advantageous. For example, it would not have made sense to incur storage costs if fairly rapid resale was not feasible. A table compiled by the long defendants indicates that for *all* long positions in February 1982 No. 2 oil contracts, defendant and nondefendant, only about 30% of all nominations specified the first two days of the delivery period. Our calculations, based upon apparently undisputed compilations submitted by Apex, of the number of nominations for each day made by each long defendant, indicate that over 60% of the long defendants' nominations were for the first two days (over 75% for the first three days); and approximately 65% of Global's nominations were for the first two days (100% in the first three days). While only about 10% of Northeast's nominations were for the first two days, over 55% were for the first three days. The nondefendant longs nominated only 15% of their contracts for delivery for the first two days (19% in the first three days). In fact, it appears that the nondefendant longs nominated at most 23% of their Apex contracts for the first three days. It therefore seems clear that not all holders of long positions in oil contracts in a climate of falling prices saw fit to take delivery early, even with respect to those contracts to be delivered by Apex. Indeed, some evidence indicates that in the two months prior to February 1982, No. 2 oil prices may have been dropping, albeit not as rapidly. In those months, very few contracts were nominated early by holders of long positions

(23a-24a). Thus, the Court of Appeals concluded that "in light of the incriminating nature of the notes regarding the telephone conversation, since we must draw reasonable inferences in favor of Apex, we conclude that the finder of fact should decide whether the denial of conspiracy by the defendants should be accepted" (24a).

The Court of Appeals did not reverse as to Global and Northeast, since the case against them had been settled. The court found the evidence of their activities relevant, however, to interpreting additional communications among these defendants and Belcher.

The court next examined several entries in the notebook of a Belcher official, William Berberich.

> On February 3, Slifka of Global spoke to Berberich. In his notebook for that day, Berberich entered Slifka's name and telephone number, followed by, "1) G.E. Warren. 150. 2) Sent Wires and Want Immediate Answer. 3) Threatened WS [illegible]." Two pages later in the notebook, on the same date, an entry reads:
>
> -- Penalty to start Fri. --
>
> -- 10% after 5 days --
>
> -- oil at 5 days --
>
> -- Bring suit against exchange
>
> -- Restraining order to prevent any further trades on Merc

(26a).

The Court of Appeals found the similarity between the Berberich notes and the notes of the Global and Northeast communication "striking" (27a). It stated that these notes would permit a finder of fact to infer Belcher's participation in the conspiracy between Global and Northeast, especially if viewed in light of handwritten notations, concerning a trader at Northeast, made by an officer of Belcher two days earlier to the effect that Belcher would "Demand *delivery*" (emphasis in original), "Look for Default" and "Merc - EFP" (24a). Several pages later, in another notation for February 1, the notebook reads, "Sat.

demand 12:01 Sat. [February 6] AM"; and in notations for February 2 appear the words "promote crunch" and "press for default" (24a-25a).

The Court of Appeals stated:

> In our view, the similarity between the notes seems striking. If a finder of fact were to infer a conspiracy between Global and Northeast, a possibility we have concluded would be reasonable in light of Denihan's notebook entries, *see supra*, it could reasonably conclude in light of Berberich's notebook entries regarding the Slifka conversation that Belcher also participated, especially if we view the Slifka conversation in light of Berberich's notations made two days earlier (e.g., "promote crunch" and "press for default"). The long defendants point out that the conversation between Berberich and Slifka took place after Belcher had made its nominations, and argue that the entries merely refer to a discussion of whether there was going to be [a] default [sic]. However, the notes could more easily be interpreted as outlining the method of continuing the pressure that already had been placed on Apex. Thus, it reasonably could be inferred that the conversation consisted of more than mere speculation concerning Apex's ability to deliver. Accordingly, in light of all of the circumstances, including communications among the defendants and their parallel conduct, we must conclude that sufficient evidence has been produced from which a fact-finder could infer that Belcher, Global, and Northeast " 'had a unity of purpose or a common design and understanding, or a meeting of the minds in an unlawful arrangement.' " *International Distribution Centers*, 812 F.2d at 793 (quoting *Michelman*, 534 F.2d at 1043). We therefore reverse the dismissal of the antitrust claims as to Belcher

(27a).

For these same reasons, the Court of Appeals reversed the District Court's dismissal of the commodities manipulation claim as to Belcher. In all other respects, the judgment of the District Court was affirmed.

Reasons for Denying the Petition

I. The Petition Presents No Issue Upon Which Certiorari Should Be Granted, But Rather Seeks A Judicial Re-Evaluation Of The Evidence Presented

Petitioners seek to establish that summary judgment was erroneously denied in this antitrust conspiracy case due to what is variously described as a misapplication, violation and/or exception to this Court's rulings in *Matsushita* and *Monsanto*.[6] Petitioners attempt to avoid a jury trial by once again requesting judicial evaluation of the massive evidence presented, and by mischaracterizing the rule of law applied below to determine whether a genuine issue of material fact existed. Rather than supporting their cause, however, the petition serves only to underscore the existence of genuine issues of material fact that the Court of Appeals properly determined should be resolved by a trier of fact. Moreover, petitioners' strained interpretation of the decision below cannot overcome its plain text, which amply demonstrates that both *Monsanto* and *Matsushita*, as well as other applicable Supreme Court precedent, were properly recognized and applied.

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[6] *Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 106 S. Ct. 1348 (1986); *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752 (1984). Petitioners do not specifically acknowledge the applicability of the *Monsanto* decision, but rather attribute the standards set forth therein to the *Matsushita* case. Although *Matsushita* restates the rule of law recognized in *Monsanto*, respondent Apex addresses these two cases separately, as did the Court of Appeals below, since distinct theories are discernible from each.

1. *Because* Monsanto *And* Matsushita *Were Properly Applied As To Petitioners, The Decision Below Is Consistent With The Rulings Of This Court And Decisions Rendered By Other Courts Of Appeal*

In a transparent attempt to elevate what are essentially result-oriented and factually based arguments to the level of "certworthiness," petitioners argue that the Court of Appeals failed to apply *Matsushita* and *Monsanto*, thereby placing itself not only in conflict with this Court but with other circuits as well.[7] This contention is nowhere supported in the decision. To the contrary the decision is manifestly based on the standards set forth by this Court in *Matsushita* and *Monsanto*.

In *Monsanto*, this Court held that evidence of dealership complaints alone was an insufficient basis upon which to infer a conspiracy in a dealer termination case. Rather, the Court held that evidence that "tends to exclude" the possibility of independent, and therefore, noncollusive action must be presented. 465 U.S. at 764. Thus, conduct that is as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of conspiracy. *Id.* In *Matsushita*, the Court expanded on the *Monsanto* formulation by adding that, unless a plausible motive supports a finding that the alleged conspiracy is economically feasible, ambiguous conduct does not give rise to an inference of conspiracy. 475 U.S. at _____, 106 S. Ct. at 1348.

The court below clearly followed these precedents in setting forth the standard of review applied herein:

> While the non-moving party must show more than a "metaphysical doubt" as to material facts, *Matsushita*, [*supra*], all inferences must be drawn in favor of the nonmoving party. *Id.* at 1356-57. However, the

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[7] Petition For a Writ of Certiorari To The United States Court of Appeals For the Second Circuit, dated October 19, 1987 at 18-20 (hereinafter cited to as "Pet. at _____").

> Supreme Court has stated that "antitrust law limits the range of permissible inferences from ambiguous evidence in a §1 case." *Id.* at 1357. Specifically, "conduct as consistent with permissible conduct as with [an] illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy." *Id.; See Monsanto,* [*supra*]. There must be some evidence that "tends to exclude the possibility that the [defendants] were acting independently." *Monsanto,* 465 U.S. at 764. Thus, evidence of parallel conduct alone cannot suffice to prove an antitrust conspiracy. A plaintiff "should present direct or circumstantial evidence that reasonably tends to prove that the [defendants] 'had a conscious commitment to a common scheme designed to achieve an unlawful objective.' " *Id.* . . .

(16a-17a).

This clear recognition of both *Monsanto* and *Matsushita* was also implemented through a painstaking and detailed evaluation of the "mass of material" presented by the parties (10a). This analysis resulted in the court's finding that the conspiracy was plausible, as required by *Matsushita* (18a-19a). The Court of Appeals also found that ample evidence "tending to exclude" the possibility of independent conduct had been presented, in accordance with *Monsanto.* It based this finding not merely on evidence of parallel conduct, but on the substantial evidence presented that petitioners' conduct resulted from a high level of interfirm communication and coordination, and a strong motive to enter into the conspiracy.[8]

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[8] Petitioners argue that the court below erroneously applied the "slight evidence" standard in reviewing their motion for summary judgment. Pet. at 14-15. While the Court of Appeals did acknowledge that standard, its decision concerning petitioners' participation in the conspiracy was based solely on the principles set forth by this Court in *Monsanto* and *Matsushita.* This result is clear from the text of the court's opinion as discussed above. Indeed, in the Apex Petition, see fn. 3 at 4, *supra,* it is demonstrated that although the Court of Appeals cited to the "slight evidence" standard, it did not apply that standard to the facts presented against *any* of the movants, including petitioners herein. Apex Petition at 20-24.

Even though it is obvious that the Court of Appeals in fact applied *Monsanto* and *Matsushita*, petitioners nonetheless maintain that an "exception" which "would empower the lower courts to dispense with the . . . clear rule in *Matsushita*" has been created (Pet. at 8). Finding no direct support for this fanciful conclusion in the decision below, petitioners apparently contend that the mere *result* in this case suggests that the court could not have applied *Monsanto* and *Matsushita*. This fallacious reasoning demonstrates that it is petitioners who have failed to analyze *Monsanto* and *Matsushita* properly. Neither case represents the virtual grant of immunity they desire.

Indeed, in *Monsanto* this Court specifically upheld the lower court's denial of a directed verdict despite its recognition of a "sharp conflict in evidence" which was susceptible of different interpretations. 465 U.S. at 769 n. 14. In direct contrast to petitioners' arguments herein, the Court in *Monsanto* held that "[t]he choice between two reasonable interpretations of the testimony properly was left for the jury". 465 U.S. at 767 n. 12. Consequently, even though the Court recognized that "[movant's] contrary evidence has force" the Court concluded that "we agree with the courts below that it was insufficient to take the issue from the jury." 465 U.S. at 768 n. 14.[9] The analysis of the Court of Appeals below is entirely based on and consistent with both *Monsanto* and *Matsushita* as is evident from a fair reading of the Court of Appeals' decision. Petitioners' strained attempts to manufacture a conflict, therefore, are to no avail and should be rejected.[10]

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[9] *Matsushita* contains no contrary analysis, but rather directs that where, as here, a plausible reason to conspire is demonstrated, the *Monsanto* formulation should be employed to determine whether a jury should be permitted to consider the merits of the claim. *See* 475 U.S. at ____, 106 S. Ct. at 1362 n. 21.

[10] It has been recognized that "[t]o justify a grant of certiorari, the conflict must truly be direct and must be readily apparent . . . ." R. Stern, E. Gressman & S. Shapiro, *Supreme Court Practice* ¶4.5, at 203 (6th ed. 1986). *See, e.g., Oregon Fish & Wildlife Dep't v. Klamath Tribe*, 473 U.S. 753 (1985); *United States v. National Bank of Commerce*, 472 U.S. 713 (1985); *Layne & Bowler Corp. v. Western Well Works, Inc.*, 261 U.S. 387 (1923).

2. *Petitioners' Obvious Purpose Is To Engage This Court In A Lengthy Re-Evaluation Of The Evidence Considered Below*

The court below was required to assess what it described as a "mass" of evidence in deciding the motions for summary judgment before it (10a). Indeed, the record on appeal was over 6800 pages.[11] It is a desire for a re-evaluation of this totality of evidence that forms the true basis for the petition herein. Indeed, although petitioners disingenuously state that the opinion below was based on "two bits of evidence" (Pet. at 9), the petition itself constitutes little more than a factual re-hashing of the substantial evidence presented below.

In *Bourjaily v. United States*, _____ U.S. _____, 107 S. Ct. 2775 (1987), this Court recently reaffirmed the necessity for consideration of all evidence presented, and not simply a piecemeal review:

> [I]ndividual pieces of evidence, insufficient in themselves to prove a point, may in cumulation prove it. The sum of an evidentiary presentation may well be greater than its constituent parts.

107 S. Ct. at 2781. Yet it is precisely a piecemeal review of the evidence that petitioners seek. Indeed, petitioners' main complaint appears to be that the court below rejected its *interpretation* of certain pieces of the evidence presented. It is axiomatic, however, that in reviewing the evidence, the court below was required to resolve all factual disputes in favor of Apex.

This Court's recent pronouncement in *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 574, 106 S. Ct. 2505 (1986) bears repeating here, since it is nowhere acknowledged by defendants:

> Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences

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[11] The eleven volume record on appeal was lodged with the Clerk of this Court, on October 17, 1987, in connection with a Petition for Certiorari filed by Apex on the same day. *See Apex Oil Co. v. DiMauro*, No. 87-633.

> from the facts are jury functions, not those of a judge, whether he is ruling on a motion for summary judgment or for a directed verdict. *The evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor.*

477 U.S. at _____, 106 S. Ct. at 2513 (emphasis added) (citations omitted). The most that can be said of petitioners' factual presentations to this Court is that they identify a host of underlying disputed issues of fact. Indeed, petitioners' factual arguments raise more questions than they claim to resolve. *See Monsanto*, 465 U.S. at 767 n.12 and 769 n.14 (holding that the case was properly sent to the jury despite "sharp conflict" in the evidence and that "[t]he choice between two reasonable interpretations of the testimony properly was left for the jury").

3. *Petitioners Seek Review Of A Denial Of Summary Judgment That Does Not Preclude Them From Presenting Their Arguments To A Jury Or To The Courts Following Any Adverse Judgment*

Petitioners' have failed to acknowledge the inescapable fact that the decision below has no final preclusive effect on their ability to vindicate their rights. Unlike a grant of summary judgment, the denial of summary judgment in no way prohibits petitioners from presenting the very arguments they assert here to a jury. In circumstances where there has been no final resolution of a case, this Court has indicated that a grant of certiorari is not generally appropriate. *Brotherhood of Locomotive Firemen & Enginemen v. Bangor & A.R. Co.*, 389 U.S. 327 (1967); *Hamilton-Brown Shoe Co. v. Wolf Brothers & Co.*, 240 U.S. 251, 258 (1916); *see also Estelle v. Gamble*, 429 U.S. 97, 115 (1976) (Stevens, J., dissenting). The complete absence of any issue of public importance or a conflict among the courts, coupled with the lack of preclusive effect of the decision below renders the Petition unworthy of this Court's consideration.

II. The Court of Appeals' Decision Is Wholly Consistent With The Decision In *Bourjaily*

In *Bourjaily*, this Court held that pursuant to Federal Rule of Evidence 801(d)(2)(E) a court, in making a preliminary factual determination that a conspiracy exists, may consider the very hearsay statements ultimately sought to be admitted upon that predicate finding. 107 S. Ct. at 2777. Thus, the Court rejected the contention that only independent evidence other than the statements sought to be admitted could be considered. *Id.*[12] The Court's decision primarily was grounded on Federal Rule of Evidence 104(a), which provides that in determining preliminary questions concerning admissibility a court "is not bound by the rules of evidence," thus permitting consideration of hearsay.

Petitioners maintain that the Court of Appeals decision is flawed because the evidence it relied upon in denying their summary judgment motion consisted *solely* of the uncorroborated Denihan notes. Petitioners' contention is wholly without merit as it is not supported by either the decision in *Bourjaily* or the decision below.

Indeed, petitioners apparently concede that *Bourjaily's* holding provides no support for their position whatsoever. They maintain, however, that the Court "*did not* hold that, in making the factual determination for purposes of Rule 801(d)(2)(E), a court may look *exclusively* to uncorroborated hearsay statements." (Pet. at 22) (emphasis in original). Whether or not

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[12] This contention was supported by the so-called "bootstrapping rule" of *Glasser v. United States*, 315 U.S. 60 (1942) and *United States v. Nixon*, 418 U.S. 683 (1974). Both *Glasser* and *Nixon* were decided prior to the enactment of Fed. R. Evid. 104(a).

the Court so held[13] is completely irrelevant to the decision of the court below.

Contrary to petitioners' totally misleading argument, the court below did not base its denial of summary judgment solely on the hearsay statements contained in the Denihan notes at issue. Rather, it was petitioners' *own* notes and communications with co-conspirators, as well as the totality of the evidence, that formed the basis for the Court of Appeals' decision. Indeed, the court below stated:

> If a finder of fact were to infer a conspiracy between Global and Northeast, a possibility we have concluded would be reasonable in light of Denihan's notebook entries, . . . it could reasonably conclude in light of [petitioners'] notebook entries regarding [a communication with a competitor] that [petitioner] also participated, especially if we view the [communication with the competitor] in light of [petitioners'] notations made two days earlier (e.g., "promote crunch" and "press for default")

(27a).

In this case, just as in *Bourjaily*, ample corroborating evidence of petitioners' participation in the conspiracy exists wholly independent of the hearsay statement at issue. Indeed, just as in *Bourjaily* such corroborating evidence was supplied in part by the petitioners' own conduct. Because this case presents no issue that is in any respect different from *Bourjaily*, and because it was decided below in accordance therewith, the petition should be denied.

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[13] In *Bourjaily* the Court stated:

> [I]t need not be decided whether, under Rule 104(a), the courts below could have relied solely upon . . . hearsay statements to establish the preliminary facts for admissibility.

107 S. Ct. at 2777.

Conclusion

For the reasons set forth above, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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No. 87-631

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

THE COASTAL CORPORATION,
COASTAL STATES MARKETING, INC.,
BELCHER OIL COMPANY,
THE BELCHER COMPANY OF NEW YORK, INC.,
BELCHER NEW ENGLAND, INC. and
BELCHER NEW JERSEY, INC.,

Petitioners,

v.

APEX OIL COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITIONERS' REPLY BRIEF

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November 30, 1987

TABLE OF AUTHORITIES

Cases

	PAGE
Hamilton-Brown Shoe Co. v. *Wolf Bros. & Co.*, 240 U.S. 251 (1916)	5
Matsushita Electric Industrial Co. v. *Zenith Radio Corp.*, 475 U.S. 574, 106 S. Ct. 1348 (1986)	4, 5
Monsanto Co. v. *Spray-Rite Service Corp.*, 465 U.S. 752 (1984)	4, 5

Statutes

15 U.S.C., § 1, Section 1, Sherman Act	4

Rules

Sup. Ct. R. 22.5	1

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PETITIONERS' REPLY BRIEF

Pursuant to Rule 22.5, Petitioners The Coastal Corporation, Coastal States Marketing, Inc., Belcher Oil Company, The Belcher Company of New York, Inc., Belcher New England, Inc., and Belcher New Jersery, Inc. (hereinafter, collectively, "Belcher" or "Petitioners") respectfully submit this reply brief to address arguments first raised by the brief in opposition of respondent Apex Oil Company (hereinafter, "Apex" or "Respondent").

1. Respondent Improperly Attributes the Actions of Dismissed Defendants to Belcher.

The District Court explicitly found, and the Court of Appeals affirmed, that long defendants Stinnes, Warren, and Eastern[1] each acted independently.[2] After the Court of Appeals' ruling, only Northeast, Global, and Belcher remain as possible members of the alleged conspiracy (32a). Respondent ignores this fact, and thereby exaggerates the scope and nature of actions taken by Belcher and its alleged co-conspirators. For example, respondent quotes a statement by the Court of Appeals that "Apex paid prices as high as 97.5¢ per gallon to several long defendants for oil" (14a)[3], but neglects to mention that the so-called "high" price of 97.5¢ per gallon was, in fact, attributable to sales by Stinnes and Eastern—parties held to have acted independently (50a-51a).[4]

Similarly, respondent's references to the Court of Appeals' calculations of early nomination patterns of the "long defendants" are not probative, for these calculations also

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[1] The term "long defendants", as used by the courts below, includes companies which held long positions in February 1982 futures contracts for No. 2 heating oil and their parent corporations: (i) Northeast Petroleum Corporation and Northeast Petroleum Industries, Inc. (collectively, "Northeast"); (ii) Global Petroleum Corporation ("Global"); (iii) Belcher; (iv) Stinnes Corporation and Stinnes Interoil, Inc. (collectively, "Stinnes"); (v) George E. Warren Corporation ("Warren"); and (vi) Eastern of New Jersey, Inc. ("Eastern"). The "long defendants" also includes brokers which represented some of these companies: (i) Joseph DiMauro ("DiMauro"); (ii) Triad Petroleum, Inc. ("Triad"); and (iii) TIC Commodities, Inc. ("TIC").

[2] The brokers DiMauro, Triad, and TIC were also found to have acted independently.

[3] Numbers in parentheses followed by "a" refer to pages in the Appendix to the Petition.

[4] Respondent's Brief in Opposition at 5 (hereinafter cited to as "Apex Opp. at ____"). Significantly, Belcher sold no oil to Apex, and took delivery of its contracts at dates later than it had originally nominated (Petition at 5; Joint Appendix at A-6104, 6305).

include figures relating to the dismissed defendants.[5] Stinnes, Warren, and Eastern were found to be independent actors; accordingly, their nomination patterns could not be grouped with those of the remaining alleged conspirators.

In all events, the factual matters now raised by Apex are irrelevant to the issue of Belcher's liability. The Court of Appeals found all the evidence amassed by Apex concerning actions against economic interest to be ambiguous (20a-21a). As to the early nominations, the Court pointedly stated that "the demand of early delivery, by itself, creates no dominant inference" (24a). Similarly, the Court noted that since early nominations became public knowledge, it would be consistent with permissible competition for a long to be inflexible, *i.e.*, to maintain its nomination (31a). Contrary to respondent's assertions, factual disputes are not before this Court.[6]

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[5] In our petition for rehearing to the Second Circuit, we argued:

> Relying on the chart prepared by Apex (A-4369), the Court stated that 'the non-defendant longs nominated only 15% of their contracts for delivery for the first two days (19% in the first three days).' Slip Op. at 3756. The information on the chart shows that if the nominations of the dismissed defendants for the first two and three days are included with those of the longs who were not defendants, the parties holding long positions (other than the putative conspirators) nominated 27.58% (960 out of 3481 contracts) of their contracts for delivery for the first two days and 30.55% (1063.5 out of 3481 contracts) for the first three days, more than twice the amount calculated by the Court. Further, since the Court used its calculations to infer that Northeast and Global (but not Belcher) were parties to a 'conspiracy', the proper analysis would be to compare the early nominations of *all* non-conspiring longs, including Belcher, with the nominations of Global and Northeast.
>
> Petition For Rehearing With Suggestion For Rehearing In Banc On Behalf Of Belcher, at 13-14.

[6] Respondent argues, incorrectly, that consideration of the petition would engage this Court in a lengthy re-evaluation of the evidence considered below. The two courts below agreed that the vast majority of the "evidence" proffered by respondent was non-probative of concerted action. Only two bits of evidence remain

(footnote continued on next page)

2. Respondent Misapprehends This Court's Decision in Monsanto.

Respondent argues that the Court of Appeals did not misapply this Court's ruling in *Matsushita*[7] and, consequently, the court below did not place itself in conflict with this Court or with other circuits. Respondent does not contest, and thereby concedes, that a misapplication of *Matsushita* below would reflect a conflict among the circuits—as we have argued in our petition.

Respondent attempts to reconcile the Court of Appeals' decision below with the principles of *Matsushita* by misreading this Court's decision in *Monsanto*.[8] From *Monsanto*, respondent claims to discern a theory of antitrust analysis which permits a § 1 antitrust case to proceed to a jury even where the evidence as a whole is incapable of supporting a *dominant* inference of concerted action—a proposition at odds with the clear language of *Matsushita* and that of *Monsanto* itself (Apex Opp. at 12-14).

The error in respondent's argument lies in its focus on the language of footnotes 12 and 14 in *Monsanto*, while failing to consult the main body of the opinion (Apex Opp. at 16). Footnote 12 stated that a jury may determine the source of complaints received by the manufacturer about its former distributor's prices. 465 U.S. at 767, n.12. Similarly, footnote 14 stated that a jury may decide whether or not complaints were made during the 15 months prior to the distributor termination and whether or not prices stabilized after 1968. *Id.* at 769, n.14. Both footnotes involved conflicts over the existence of specific underlying facts, not over

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(footnote continued from preceding page)

(32a, 92a-93a), namely, those discussed in our petition (at pp. 8-20).

[7] *Matsushita Electric Industrial Co.*, v. *Zenith Radio Corp.*, 475 U.S. 574, 106 S. Ct. 1348 (1986).

[8] *Monsanto Co.* v. *Spray-Rite Service Corp.*, 465 U.S. 752 (1984).

the ultimate distinction between concerted and independent action.

As to the distinction between concerted and independent action, *Monsanto* clearly held that "a plaintiff seeking damages for a violation of § 1 must present evidence 'that tends to exclude the possibility' that the alleged conspirators acted independently". *Matsushita*, 106 S.Ct. at 1357, *quoting Monsanto*, 465 U.S. at 764. Accordingly, respondent is not entitled to go to the jury where the evidence as a whole remains as consistent with an inference of independent action as with an inference of concerted action. As *Monsanto* recognized and *Matsushita* clearly states: "The antitrust law[s] limit[ ] the range of permissible inferences from ambiguous evidence in a § 1 case." 106 S. Ct. at 1357. Where, as here, the evidence was not, and *was not held to be*, capable of a *dominant* inference of concerted action, the case may not proceed to trial (Petition at 8-20).

3. Certiorari is Appropriate Following Denial of Summary Judgment in Order to Secure Uniformity of Decision Among the Circuits and to Address Issues of Public Importance.

Respondent suggests that a grant of certiorari is inappropriate here because the denial of summary judgment below has no preclusive effect on petitioner's ability to vindicate its rights at trial (Apex Opp. at 16). Yet where there are issues of public importance or a conflict among the circuits, this Court has not hesitated to grant certiorari because of the interlocutory status of a case. Indeed, *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916), a case cited by respondent, states that certiorari jurisdiction will be exercised "in cases of peculiar gravity and general importance, or in order to secure uniformity of decision". *Matsushita* itself involved a grant of certiorari following the denial of summary judgment. In view of the enormous expenditure of judicial effort which must be devoted to antitrust conspiracy trials and the need for uniformity of decision in this important area of antitrust law,

we respectfully submit this matter is of such exceptional importance as to warrant review by this Court.

Conclusion

For the foregoing reasons and those set forth in the petition, petitioners respectfully pray that the Court issue a writ of certiorari to review the judgment of the Court of Appeals for the Second Circuit.

November 30, 1987

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